

3-22-2012

Medical Recovery Services v. Bonneville Billing and Collections Clerk's Record v. 2 Dckt. 39408

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/
idaho_supreme_court_record_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

Recommended Citation

"Medical Recovery Services v. Bonneville Billing and Collections Clerk's Record v. 2 Dckt. 39408" (2012). *Idaho Supreme Court Records & Briefs*. 4436.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/4436

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

Vol. 2 of 2

LAW CLERK

SUPREME COURT

OF THE

STATE OF IDAHO

40966

MEDICAL RECOVERY SERVICES, LLC, a limited liability company,

Plaintiff and

VOL. II of II

Respondent

VS.

BONNEVILLE BILLING AND COLLECTIONS, INC., a corporation,

COPY

Defendant and

Appellant

Appealed from the District Court of the Seventh Judicial

District of the State of Idaho, in and for Bonneville County

Hon. Dane H. Watkins, Jr., District Judge

Todd R. Erikson, TODD R. ERIKSON, P.A.

3456 E. 17th St., Ste. 280, Idaho Falls, ID 83406

Attorney for Appellant

Bryan D. Smith, SMITH DRISCOLL & ASSOCIATES

PO Box 50731, Idaho Falls, ID 83405

Attorney for Respondent

Filed this 22 day of MAR, 2012

Supreme Court
By: CL Clerk of Appeals

Clerk

Deputy

40966

39408

IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|--|---|-----------------------|
| MEDICAL RECOVERY SERVICES, LLC, |) | |
| an Idaho limited liability company, |) | |
| |) | |
| Plaintiff/Respondent, |) | Case No. CV-2008-5817 |
| |) | |
| vs. |) | Docket No. 39408-2011 |
| |) | |
| BONNEVILLE BILLING AND |) | VOLUME II of II |
| COLLECTIONS, INC., a Utah corporation, |) | |
| |) | |
| Defendant/Appellant. |) | |
| |) | |

* * * * *

CLERK'S RECORD ON APPEAL

* * * * *

Appeal from the District Court of the
Seventh Judicial District of the State of Idaho,
in and for the County of Bonneville

HONORABLE DANE H. WATKINS, JR., District Judge.

* * * * *

Attorney for Appellant

Todd R. Erikson
TODD R. ERIKSON, P.A.
3456 E. 17th St., Ste. 280
Idaho Falls, ID 83406

Attorney for Respondent

Bryan D. Smith
SMITH DRISCOLL & ASSOCIATES
PO Box 50731
Idaho Falls, ID 83405

TABLE OF CONTENTS

| | Page |
|---|--------------|
| ROA Report, printed February 2, 2012 | Vol. I - 1 |
| Complaint and Demand for Jury Trial, filed September 19, 2008 | Vol. I - 9 |
| Answer, filed October 29, 2008..... | Vol. I - 15 |
| Motion for Summary Judgment, filed march 19, 2009 | Vol. I - 17 |
| Brief in Support of Motion for Summary Judgment, filed March 19, 2009 | Vol. I - 19 |
| Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment, filed March 19, 2009 | Vol. I - 27 |
| Affidavit of Bryan Zollinger, filed March 19, 2009 | Vol. I - 31 |
| Responses to First Request for Admissions, filed April 21, 2009 | Vol. I - 73 |
| Defendant's Brief Re: Summary Judgment, filed April 21, 2009..... | Vol. I - 76 |
| Order Denying Plaintiff's Motion for Summary Judgment, entered June 4, 2009..... | Vol. I - 85 |
| Judgment, entered June 11, 2009 | Vol. I - 88 |
| Notice of Appeal, filed July 20, 2009 | Vol. I - 90 |
| Appellate Brief, filed August 17, 2009..... | Vol. I - 93 |
| Defendant/Respondent's Brief, filed October 7 , 2009..... | Vol. I - 106 |
| Notice of Intent to Dismiss Appeal for Lack of Jurisdiction, entered November 19, 2009 | Vol. I - 117 |
| Order of Dismissal, entered December 11, 2009 | Vol. I - 122 |
| Brief in Support of Motion for Reconsideration, filed April 8, 2010 | Vol. I - 124 |
| Supplemental Brief, filed May 12, 2010..... | Vol. I - 129 |
| Defendant/Respondent's Brief, May 12, 2010 | Vol. I - 130 |
| Order on Motion to Reconsider, entered June 29, 2010 | Vol. I - 141 |

| | |
|---|---------------|
| Order Granting Defendant’s Motion for Summary Judgment, entered August 24, 2010 | Vol. I - 144 |
| Order on Settlement of Attorney Fees and Costs, entered November 17, 2010..... | Vol. I - 146 |
| Judgment, entered November 17, 2010 | Vol. I - 148 |
| Brief in Support of Motion for Reconsideration, filed January 13, 2011..... | Vol. II - 150 |
| Order on Reconsideration, entered February 16, 2011 | Vol. II - 163 |
| Amended Complaint and Demand for Jury Trial, filed February 23, 2011 | Vol. II - 169 |
| Order on Motion for Reconsideration and Motion to File and Amended Complaint, entered April 29, 2011 | Vol. II - 178 |
| Notice of Appeal, filed May 3, 2011 | Vol. II - 184 |
| Appellant Brief, filed July 11, 2011 | Vol. II - 187 |
| Respondent’s Brief, filed August 8, 2011 | Vol. II - 213 |
| Reply Brief, filed August 29, 2011 | Vol. II - 229 |
| Memorandum Decision Re: Appeal, filed October 6, 2011 | Vol. II - 241 |
| Motion for Reconsideration Brief in Support of Motion, filed October 20, 2011 | Vol. II - 256 |
| Notice of Appeal, filed November 17, 2011 | Vol. II - 266 |
| Order Denying Defendant’s Motion for Reconsideration, entered November 22, 2011..... | Vol. II - 269 |
| Request for Additional Transcript and Record, filed November 30, 2011 | Vol. II - 271 |
| Request for Additional Record, filed January 26, 2012..... | Vol. II - 273 |
| Clerk’s Certification of Exhibits, dated February 2, 2012 | Vol. II - 275 |
| Clerk’s Certificate, dated February 2, 2012..... | Vol. II - 276 |
| Certificate of Service | Vol. II - 277 |

INDEX

Page

| | |
|---|---------------|
| Affidavit of Bryan Zollinger, filed March 19, 2009 | Vol. I - 31 |
| Amended Complaint and Demand for Jury Trial, filed February 23, 2011 | Vol. II - 169 |
| Answer, filed October 29, 2008..... | Vol. I - 15 |
| Appellant Brief, filed July 11, 2011 | Vol. II - 187 |
| Appellate Brief, filed August 17, 2009..... | Vol. I - 93 |
| Brief in Support of Motion for Reconsideration, filed April 8, 2010 | Vol. I - 124 |
| Brief in Support of Motion for Reconsideration, filed January 13, 2011..... | Vol. II - 150 |
| Brief in Support of Motion for Summary Judgment, filed March 19, 2009 | Vol. I - 19 |
| Certificate of Service | Vol. II – 277 |
| Clerk’s Certificate, dated February 2, 2012..... | Vol. II - 276 |
| Clerk’s Certification of Exhibits, dated February 2, 2012 | Vol. II - 275 |
| Complaint and Demand for Jury Trial, filed September 19, 2008 | Vol. I - 9 |
| Defendant/Respondent’s Brief, May 12, 2010 | Vol. I - 130 |
| Defendant/Respondent’s Brief, filed October 7 , 2009..... | Vol. I - 106 |
| Defendant’s Brief Re: Summary Judgment, filed April 21, 2009..... | Vol. I - 76 |
| Judgment, entered June 11, 2009 | Vol. I - 88 |
| Judgment, entered November 17, 2010 | Vol. I - 148 |
| Memorandum Decision Re: Appeal, filed October 6, 2011..... | Vol. II - 241 |
| Motion for Reconsideration Brief in Support of Motion, filed October 20, 2011 | Vol. II - 256 |
| Motion for Summary Judgment, filed march 19, 2009..... | Vol. I - 17 |

| | |
|---|---------------|
| Notice of Appeal, filed July 20, 2009 | Vol. I - 90 |
| Notice of Appeal, filed May 3, 2011 | Vol. II - 184 |
| Notice of Appeal, filed November 17, 2011 | Vol. II - 266 |
| Notice of Intent to Dismiss Appeal for Lack of Jurisdiction, entered November 19, 2009 | Vol. I - 117 |
| Order Denying Defendant’s Motion for Reconsideration, entered November 22, 2011 | Vol. II - 269 |
| Order Denying Plaintiff’s Motion for Summary Judgment, entered June 4, 2009..... | Vol. I - 85 |
| Order of Dismissal, entered December 11, 2009 | Vol. I - 122 |
| Order on Motion for Reconsideration and Motion to File and Amended Complaint, entered April 29, 2011 | Vol. II - 178 |
| Order on Motion to Reconsider, entered June 29, 2010 | Vol. I – 141 |
| Order Granting Defendant’s Motion for Summary Judgment, entered August 24, 2010 | Vol. I - 144 |
| Order on Reconsideration, entered February 16, 2011 | Vol. II - 163 |
| Order on Settlement of Attorney Fees and Costs, entered November 17, 2010..... | Vol. I - 146 |
| Reply Brief, filed August 29, 2011 | Vol. II - 229 |
| Request for Additional Record, filed January 26, 2012..... | Vol. II - 273 |
| Request for Additional Transcript and Record, filed November 30, 2011 | Vol. II - 271 |
| Respondent’s Brief, filed August 8, 2011 | Vol. II - 213 |
| Responses to First Request for Admissions, filed April 21, 2009 | Vol. I - 73 |
| ROA Report, printed February 2, 2012 | Vol. I - 1 |
| Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment, filed March 19, 2009 | Vol. I - 27 |
| Supplemental Brief, filed May 12, 2010..... | Vol. I - 129 |

3ma 111
CE

Bryan D. Smith, Esq.
Idaho State Bar # 4411
Bryan N. Zollinger
Idaho State Bar # 8001
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731

BONNEVILLE COUNTY
IDAHO
11 JAN 13 PM 3:08

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MEDICAL RECOVERY SERVICES, LLC, an
Idaho limited liability company,

Plaintiff,

vs.

BONNEVILLE BILLING AND COLLECTIONS,
INC, a Utah corporation,

Defendant.

Case No. CV-08-5817

**BRIEF IN SUPPORT
OF MOTION FOR
RECONSIDERATION**

I. INTRODUCTION.

This action arises out of Medical Recovery Services, LLC's (hereinafter "MRS") collection on a judgment it obtained against Stacie Christ. MRS has filed suit claiming that Bonneville Billing and Collections, Inc. (hereinafter "BB&C") has been unjustly enriched through its conversion of property belonging to MRS. Because this court has yet to rule on the precise issue of unjust enrichment, MRS files this motion for reconsideration.

II. STATEMENT OF FACTS.

On April 23, 2008, MRS filed a complaint against Stacie Christ in case number CV-08-2399.¹

On June 4, 2008, MRS obtained a judgment in case number CV-08-2399 against Stacie Christ for the amount of \$1,868.15.²

On June 12, 2008, MRS obtained an order for continuing garnishment against Stacie Christ's employer, Western States Equipment Company, hereinafter ("WSEC").³

On June 18, 2008, MRS, through the Bonneville County Sheriff, served a Writ of Execution and Notice of Continuing Garnishment on Stacie Christ's employer, WSEC.⁴

On June 23, 2008, WSEC returned the Acknowledgement of Receipt of Garnishment to the Bonneville County Sheriff.⁵

On July 10, 2008, WSEC inadvertently sent Check No. 0708908235 in the amount of \$331.00 to Bonneville Billing and Collections, Inc. (hereinafter "BB&C") rather than to the Bonneville County Sheriff. The mistake was the result of Bonneville Billing and Collections being sequentially next to Bonneville County Sheriff on a pull-down computer menu.⁶

¹ See Complaint attached to the Affidavit of Bryan N. Zollinger dated March 19, 2009 as Exhibit "A".

² See Default Judgment attached to the Affidavit of Bryan N. Zollinger dated March 19, 2009 as Exhibit "B".

³ See Order for Continuing Garnishment attached to the Affidavit of Bryan N. Zollinger dated March 19, 2009 as Exhibit "C".

⁴ See Notice of Continuing Garnishment attached to the Affidavit of Bryan N. Zollinger dated March 19, 2009 as Exhibit "D".

⁵ See Acknowledgement of Receipt of Garnishment attached to the Affidavit of Bryan N. Zollinger dated March 19, 2009 as Exhibit "E".

⁶ See pp. 14, 16-17, 29, 37 of the transcript of the Deposition of Clayne Bodily taken December 12, 2008, attached as Exhibit "F" to the Affidavit of Bryan N. Zollinger dated March 19, 2009; Responses to Plaintiff's First Request for Admissions to Bonneville Billing and Collections, Inc. dated November 6, 2008 attached to the Affidavit of Bryan N. Zollinger dated March 19, 2009 as Exhibit "G"; see specifically Response to Request No. 6.

On July 24, 2008, WSEC inadvertently sent Check No. 0708971963 in the amount of \$394.84 to BB&C rather than to the Bonneville County Sheriff. The mistake was the result of Bonneville Billing and Collections being sequentially next to Bonneville County Sheriff on a pull-down computer menu.⁷

On August 7, 2008, WSEC inadvertently sent Check No. 0808036464 in the amount of \$357.38 to BB&C rather than to the Bonneville County Sheriff. The mistake was the result of Bonneville Billing and Collections being sequentially next to Bonneville County Sheriff on a pull-down computer menu.⁸

On August 20, 2008, Bonneville County Sheriff Deputy, Sherrie Berggren, informed MRS, via letter, that Alice Hannaford, the payroll administrator for WSEC, had informed her that WSEC had mistakenly sent the checks to BB&C rather than the Bonneville County Sheriff and that Alice Hannaford had spoken to Clayne Bodily, the office manager of BB&C, and explained the error and that Mr. Bodily refused to return the money to WSEC.⁹

On August 21, 2008, MRS sent a demand letter to BB&C explaining the situation and demanding that it return the \$1,083.21 to WSEC within 10 days.¹⁰

⁷ See pp. 14,16-17, 29, 37 of the transcript of the Deposition of Clayne Bodily taken December 12, 2008, attached as Exhibit "F" to the Affidavit of Bryan N. Zollinger dated March 19, 2009; Responses to Plaintiff's First Request for Admissions to Bonneville Billing and Collections, Inc. dated November 6, 2008 attached to the Affidavit of Bryan N. Zollinger dated March 19, 2009 as Exhibit "G"; see specifically Response to Request No. 6.

⁸ See pp. 14, 16-17, 29, 37 of the transcript of the Deposition of Clayne Bodily taken December 12, 2008, attached as Exhibit "F" to the Affidavit of Bryan N. Zollinger dated March 19, 2009; Responses to Plaintiff's First Request for Admissions to Bonneville Billing and Collections, Inc. dated November 6, 2008 attached to the Affidavit of Bryan N. Zollinger dated March 19, 2009 as Exhibit "G"; see specifically Response to Request No. 6.

⁹ See Letter from Bonneville County Sheriff dated August 20, 2008, attached as Exhibit "H" to the Affidavit of Bryan N. Zollinger dated March 19, 2009.

¹⁰ See Demand letter sent to Bonneville Billing and Collections dated August 21, 2008, attached as Exhibit "I" to the Affidavit of Bryan N. Zollinger dated March 19, 2009; See pp. 38-39 of the transcript of the Deposition of Clayne Bodily taken December 12, 2008, attached as Exhibit "F" to the Affidavit of Bryan N. Zollinger dated March 19, 2009.

On August 28, 2008, BB&C sent a response letter to MRS stating that it had received the above described checks but that it would not return the \$1,083.21 to WSEC.¹¹

On September 18, 2008, MRS filed a complaint in the current action in Bonneville County for conversion.¹²

On November 6, 2008, BB&C admitted that before the filing of this lawsuit, it had knowledge that the checks from Western States Equipment Company were sent to it by mistake.¹³

III. STATEMENT OF PROCEDURE.

On September 19, 2008, MRS filed a complaint alleging that BB&C had converted property belonging to MRS and that BB&C had been unjustly enriched at the expense of MRS.

On June 4, 2009, the court issued its order on MRS' motion for summary judgment. The court found that WSEC mistakenly sent BB&C \$1,083.21. The court ruled that BB&C received the money in "good faith." Therefore, BB&C was not liable to MRS for conversion or unjust enrichment.

On June 11, 2009, the court entered judgment in favor of BB&C.

On July 20, 2009, MRS filed a notice of appeal to the district court.

On December 11, 2009, the district court dismissed the appeal because the judgment the magistrate court entered was not final. The judgment was not final because MRS had a

¹¹ See Response letter from Bonneville Billing and Collections dated August 28, 2008, attached as Exhibit "J" to the Affidavit of Bryan N. Zollinger dated March 19, 2009.

¹² See Complaint.

¹³ Responses to Plaintiff's First Request for Admissions to Bonneville Billing and Collections, Inc. dated November 6, 2008 attached to the Affidavit of Bryan N. Zollinger dated March 19, 2009 as Exhibit "G"; see specifically Response to Request No. 6.

remaining cause of action for constructive trust that the court had not ruled on. Thus, less than all of the claims had been adjudicated thereby making the judgment not “final.”

On April 8, 2010, MRS filed a motion for reconsideration claiming that on appeal MRS had discovered the existence of Idaho Code Section 18-2403(c). This code section criminalizes keeping mistakenly delivered property known to belong to another without returning the property to the owner. MRS contended that BB&C’s conduct fell squarely within this code section thus making BB&C’s conduct a felony. MRS further contended that BB&C had to be unjustly enriched because it had to commit a felony to keep the money.

On June 29, 2010, the court denied MRS’ motion for reconsideration. The court denied the motion relying on *State v. Culbreth*, 146 Idaho 322 (Ct. App. 2008). This case involved dissimilar facts in which the defendant took her dog from an animal shelter to avoid paying shelter fees. Importantly, this case does not even involve misdelivery of the property of another. This court relied on *Culbreth* to summarily conclude without any explanation that MRS’ motion should be denied.

On November 17, 2010, this court entered judgment against MRS in the amount of \$10,658.00 that included an award of attorney’s fees and costs to BB&C.

On 12/1/2010, MRS filed a motion for reconsideration based on the following grounds:

1. This court has never addressed the issue of whether MRS had any type of property interest in the \$1,083.21 that it garnished;
2. This court has never addressed the issue that BB&C could not possibly have acted in good faith and keep the money once BB&C learned that it had received the money by mistake;

3. This court has never applied or distinguished Idaho Code Section 18-2403(c); instead, this court relied on a case that does not even involve the mistaken delivery of property nor does the case even address the relevant subpart (c) of Section 18-2403; and
4. This court has never addressed how BB&C was not unjustly enriched at the expense of MRS when MRS filed the complaint against Mr. Christ, obtained a judgment, garnished Mr. Christ's wages, and would have received the garnishment money but for a mistake in delivery to BB&C, while BB&C did not have to do anything (except be the fortunate recipient of a mistaken delivery) to get the money.

IV. MOTION FOR RECONSIDERATION.

Under I.R.C.P. 11(a)(2)(B), a motion for reconsideration can be made at any time within 14 days after entry of judgment. Here, Judgment was entered on November 17, 2010. This means that MRS had until December 1, 2010 to file its motion for reconsideration. Given that MRS filed its motion for reconsideration on December 1, 2010, the motion is timely.

V. MRS HAS PROPERTY RIGHTS IN THE GARNISHED FUNDS SUPERIOR TO BB&C, AND BB&C CONVERTED THESE SUPERIOR PROPERTY RIGHTS.

Idaho Code permits a judgment creditor to attach and garnish the wages of a judgment debtor and provides the procedure for garnishing those wages. I.C. §§ 8-507 *et. seq.* Idaho courts have held that by complying with these statutory procedures a judgment creditor obtains a lien upon the attached property by virtue of garnishment proceedings. *Federal Reserve Bank of San Francisco v. Smith*, 42 Idaho 224 (1926). Courts have described a garnishment as "the process by which the garnishee is brought into court, and also that by

which the defendant's credit or property is attached in the garnishee's hands. Its service is constructive seizure by notice. It is attachment in the hands of a third person." *In re Aughenbaugh*, 2002 WL 33939738 (Bankr.D.Idaho 2002); *See also Kaesenmeyer v. Smith*, 22 Idaho 1 (1912)(holding that garnishment on bank account created a lien superior to all later equitable claims). A creditor's lien becomes "perfected as of the date of service of the paperwork on [the garnishee] by the sheriff." *In re Aughenbaugh*. Additionally, property attached and not physically in possession of the creditor is constructively in possession of the creditor through the levying officer as his agent. *Bass v. Stodd*, 357 F.2d 458, 465 (9th Cir. 1966).

In this case, MRS obtained a judgment against Stacie Christ and had the Bonneville County Sheriff serve the writ of execution on Stacie Christ's employer WSEC on June 18, 2008. When the sheriff served the writ of execution on WSEC, MRS obtained a perfected lien on the attached future earnings of Stacie Christ in possession of the garnishee. As of this date, MRS had property rights in these attached future earnings superior to all other parties including BB&C and Stacie Christ. Therefore, once these future wages were attached and payable to Stacie Christ, MRS was constructively in possession of the property through the levying officer, Bonneville County Sheriff, as its agent.

Conversion has been defined as "a distinct act of dominion wrongfully asserted over another's personal property in denial of or inconsistent with rights therein." *Luzat v. Western Sur. Co.*, 107 Idaho 693, 696 (1984). It is not necessary that the actor intend to commit a trespass or conversion. *See Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732, 743 (1999). A positive act of dominion over another's property is all that is required. *Id.* at 743. "An actor may be liable where he has in fact exercised dominion or control, although he may be quite

unaware of existence of rights with which he interferes, and a defendant's intention, good or bad faith, and his knowledge or mistake are immaterial." *Id.* Further, Idaho courts have held that a "demand by the rightful owner and a refusal by the alleged tortfeasor are necessary elements of the tort of conversion." *Id.*

In this case, BB&C has admitted that it has received the three checks from WSEC.¹⁴ BB&C has admitted that it had knowledge that these checks totaling \$1,083.21 were sent to it by mistake.¹⁵ Further, both Alice Hannaford, payroll administrator for WSEC, and MRS informed BB&C that the payments were intended to go to the Bonneville Sheriff who would then forward the payments to MRS who was the rightful owner of the property.¹⁶ MRS as the rightful owner made a demand in writing to BB&C who then refused to return the property.¹⁷ Thus, it is clear that BB&C has in fact wrongfully exercised dominion and control over MRS' personal property in denial of or inconsistent with MRS' rights. WSEC and MRS notified BB&C that WSEC had mistakenly sent the money to BB&C. These notifications put BB&C on notice that MRS was the rightful owner of the money it had mistakenly received. After being put on notice, BB&C refused to return the property to MRS. Thus, this court should rule as a matter of law that BB&C has unlawfully converted MRS' personal property, which property is valued at \$1,083.21.

This court has never ruled whether MRS had any property interest in the garnished proceeds nor has this court explained why MRS' attachment was not some property interest

¹⁴ See Fact No. 11 of plaintiff's Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment filed concurrently herewith.

¹⁵ See Fact Nos. 13 & 11 of plaintiff's Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment filed concurrently herewith.

¹⁶ See Fact Nos. 9 & 10 of plaintiff's Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment filed concurrently herewith.

¹⁷ See Fact No. 10 of plaintiff's Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment filed concurrently herewith.

that BB&C could convert. This court has simply ruled that BB&C did not know about the misdelivery at the time it received the money and therefore acted in good faith. Even so, there is no dispute that BB&C subsequently learned about the misdelivery when counsel for MRS demanded return of the money and still exercised dominion and control over the money. This court has never explained why this is not conversion.

VI. BB&C HAS BEEN UNJUSTLY ENRICHED AT THE EXPENSE OF MRS.

Idaho courts have held that “unjust enrichment occurs where a defendant receives a benefit which would be inequitable to retain without compensating the plaintiff to the extent that retention is unjust.” *Vanderford Co., Inc. v. Knudson*, 144 Idaho 547 (2007). In Idaho a plaintiff must establish three elements to establish a prima facie case for unjust enrichment. A plaintiff must show that (1) a benefit is conferred upon the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 88 (1999).

Here, MRS has spent time and money (attorney’s fees, filing fees, service fees, and sheriff’s fees) in obtaining and collecting on a judgment. Specifically, MRS has spent time and resources to prepare a complaint and summons, obtain a judgment, obtain a writ of execution, had all of these documents served upon the interested parties, and recovered \$1,083.21. There is no question that, but for the misdelivery, MRS would have received the \$1,083.21. BB&C has admitted that it received the checks, deposited the checks, and has refused to return the

\$1,083.21.¹⁸ Thus, BB&C has admittedly appreciated the benefit of MRS' time and costs in the amount of at least \$1,083.21. It would be inequitable for BB&C to accept the benefit of MRS' labors and costs in the amount of \$1,083.21 without paying MRS for the value of the benefit.

Again, this court has never addresses or explained why BB&C's actions do not amount to unjust enrichment. This court simply ruled against MRS without any explanation. MRS submits that this court needs to provide an analysis so that MRS can evaluate its position with respect to pursuing an appeal.

VII. BB&C'S VIOLATION OF IDAHO CODE SECTION 18-2403 COMPELS THE CONCLUSION THAT BB&C HAS BEEN UNJUSTLY ENRICHED.

In relevant part, Idaho Code Section 18-2403 states:

(1) A person steals property and commits theft when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

(2) Theft includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subsection (1) of this section, committed in any of the following ways:

(a) By deception obtains or exerts control over property of the owner;

(b) By conduct heretofore defined or know as larceny; common law larceny by trick; embezzlement; extortion; obtaining property, money or labor under false presentences; or receiving stolen goods;

(c) By acquiring lost property. A person acquires lost property when he exercises control over property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or the nature or amount of the property, without taking reasonable measures to return such property to the owner; or a person commits theft of lost or mislaid property when he:

- 1. Knows or learns the identity of the owner or knows, or is aware of, or learns of a reasonable method of identifying the owner; and**
- 2. Fails to take reasonable measures to restore the property to the owner; and**
- 3. Intends to deprive the owner permanently of the use or benefit of the property.**

Idaho Code § 18-2403 (emphasis added.)

¹⁸ See Fact No. 11 of plaintiff's Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment filed concurrently herewith.

Idaho Code § 18-2402(6) defines owner as “any person who has a right to possession thereof superior to that of the taker, obtainer or withholder.” Idaho Code §§ 18-2407 and 18-2408 make theft of property with a value in excess of one thousand dollars (\$1,000) felony grand theft. In discussing 18-2403, one Idaho court has explained the following:

It is well established at common law that one who finds and appropriates lost property acquires a complete right thereto against all the world **except the true owner**. *Morgan and Bros. Manhattan Storage Co. v. McGuire*, 114 Misc.2d 951, 452 N.Y.S.2d 986 (1982); *Campbell v. Cochran*, 416 A.2d 211, 221 (Del.1980); *Paset v. Old Orchard Bank & Trust Co.*, 62 Ill.App.3d 534, 19 Ill.Dec. 389, 378 N.E.2d 1264 (1978). See also 36A C.J.S. *Finding Lost Goods* § 5 (1961); 1 Am.Jur.2d, *Abandoned, Lost and Unclaimed Property*, § 19 (1962). In general, the character of the thing found does not affect the property rights of the finder. However, ***should the finder know or have reasonable means of discovering the true owner, he must do so*** or he may be guilty of larceny. See, e.g., 1 Am.Jur. *Abandoned, Lost and Unclaimed Property*, § 28.

* * *

Idaho criminal law embodies this principle, providing that a person may be held criminally liable for theft “when he exercises control over property of another which he knows to have been lost or mislaid ... *without taking reasonable measures to return the property to the owner.*” I.C. § 18-2403(2)(c). (Emphasis added).

State v. Evans, 119 Idaho 383, 386 (Ct. App. 1991.)

Idaho Code makes the obtaining and withholding of another’s property, with a value in excess of a thousand dollars, grand theft when the property has “been delivered under a mistake as to the identity of the recipient” and the party thereafter “learns the identity of the owner.” Idaho Code § 18-2403 is nearly identical to theft provisions of several other states, which have held that parties who received funds as a result of mistaken delivery are guilty of theft. See *Cora v. State*, 2009 WL 1471732 (Ark. App. 2009).

In *Cora*, a finance company mistakenly sent a payment to a boat dealer in behalf of a purchaser who had already obtained other financing and used that other financing to pay for

the boat. The boat dealer did not know of the overpayment and used the mistakenly sent funds to pay expenses learning only later that it had received the mistaken payment. When the boat dealer was unable to repay the amount it had mistakenly received, the boat dealer was charged and convicted of theft under a statute nearly identical to Idaho Code § 18-2403(c).

Here, the same result follows. Stacie Christ's employer mistakenly sent the garnishment checks to "Bonneville Billing and Collections" instead of "Bonneville County Sheriff." MRS is an "owner" because MRS' rights to the mistakenly delivered money are superior to BB&C who is just the mere possessor of the mistakenly delivered funds. See Idaho Code § 18-2402(6) (which defines owner as "any person who has a right to possession thereof superior to that of the taker, obtainer or withholder"). As soon as BB&C learned the identity of MRS as the owner of the funds, exercised dominion and control over the funds, and refused to return the funds, BB&C committed felony grand theft under Idaho Code § 18-2403. This wrongful act amounts to grand theft under Idaho law. See Idaho Code §§ 18-2407 and 18-2408. Even if the Bonneville County Sheriff or WSEC were the true owner and not MRS, MRS submits that conduct amounting to grand theft against the Bonneville County Sheriff, WSEC or MRS necessarily makes that conduct at least unjust enrichment if not conversion.

This court has ignored the plain language of Section 18-2403(c). Instead, this court has relied on *State v. Culbreth*, *supra*, 146 Idaho at 322 for the proposition that BB&C would have to employ "deception, trick, extortion, false pretenses or false promise" for Section 18-2403 to apply. However, the court in *Culbreth* applied its analysis to subparts (a), (b) and (d) of Section 18-2403. The court's discussion in *Culbreth* never addressed subpart (c) of Section 18-2403. This is important because MRS claims that subpart (c) of Section 18-2403 is the subsection that

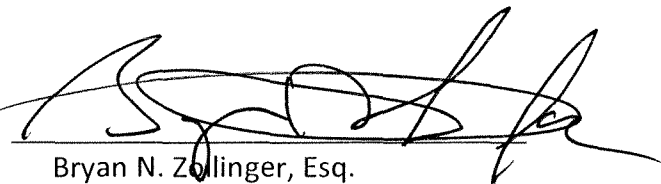
applies here because this subpart addresses BB&C's exercising control over property which it knew to have been delivered under a mistake as to the identity of the recipient. In other words, there are multiple subparts to Section 18-2403. This court has never addressed the applicability of Section 18-2403(c) to the facts of this case.

VIII. CONCLUSION.

For all the reasons set forth above, Medical Recovery Services, respectfully requests that the court grant its motion for reconsideration.

DATED this 13th day of January 2011.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 
Bryan N. Zollinger, Esq.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of January, 2011, I caused a true and correct copy of the foregoing **BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION** to be served, by placing the same in a sealed envelope and depositing it in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Persons Served:

Todd R. Erikson, P.A.
3456 East 17th Street, Suite 280
Idaho Falls, ID 83405

() Hand (x) Mail


Bryan N. Zollinger, Esq.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

FILED 16 AM 9:33

MEDICAL RECOVERY SERVICES, LLC)
)
Plaintiff,)
)
Vs.)
)
BONNEVILLE BILLING &)
COLLECTIONS, INC)
)
Defendant.)
_____)

CASE NO: CV 08-5817

Order on Reconsideration

This case stems from a collection action originally brought by Medical Recovery Services, LLC (hereinafter "MRS") against Stacie Christ wherein, in that case, Bonneville County Case Number CV-08-2399, MRS obtained a judgment against Ms. Christ in the sum of \$1,877.23. MRS sought to collect the judgment through the Bonneville County Sheriff serving a Notice of Continuing Garnishment and a Writ of Execution on Christ's employer Western States Equipment Company (hereinafter "WSEC"). WSEC identified and withheld some wages of Christ and sent them not to the Sheriff pursuant to the Writ of Execution but sent to Bonneville Billing and Collections, Inc. (hereinafter "BBC"), by mistake, three checks in the total sum of \$1,083.21.

As it turned out BBC also had claims against Christ for which lawsuits had been filed. BBC applied the funds from WSEC to debts owed to BBC and dismissed one of the lawsuits it had against Christ before learning that the monies had been forwarded by WSEC by mistake. MRS has sued BBC herein seeking a judgment for the \$1,083.21 and costs and attorney fees.

The court has been asked to reconsider the following orders from this case:

1. June 4, 2009 *Order Denying Plaintiff's Motion for Summary Judgment*;
2. June 29, 2010 *Order on Motion for Reconsideration*;
3. August 24, 2010 *Order Granting Defendants Motion for Summary Judgment*;
4. November 17, 2010 *Order on Settlement of Attorney Fees and Costs*;
5. November 17, 2010 *Judgment*.

The theories upon which relief has been sought are stated in the *Complaint and Demand for Jury Trial* as conversion, constructive trust and unjust enrichment. The Motion on which the June 29, 2010 *Order on Motion for Reconsideration* was based

upped the ante considerably when an additional theory of criminal conversion of property was introduced, on which theory MRS also seeks to obtain relief.

The original judge in this case has retired and so the reconsideration is being conducted by the undersigned. This court has made a full review of the file. Since this reconsideration is being conducted by a new judge Plaintiff is being given another "bite at the apple", so to speak, but this bite, for the following reasons provides no additional satisfaction to the Plaintiff and will be as unsatisfying as the previous bites.

The essential facts are stated in the *Separate Statement of Undisputed facts in Support of Motion for Summary Judgment* filed herein on March 9, 2009 and *Defendants Brief RE: Summary Judgment* filed April 29, 2009. It is not necessary to recite herein all the facts as stated in those two documents, but this decision has been made with reference to those fact statements.

On June 18, 2008 the Bonneville County Sheriff served a Writ of Execution and Notice of Continuing Garnishment on Christ's employer WSEC. On June 23, WSEC returned the Acknowledgment of Receipt of Garnishment to the Bonneville County Sheriff. Money was withheld by WSEC as a result of the garnishment, in the amounts of July 10, 2008, \$331.00, July 24, 2008 \$394.83, and August 7, 2008, \$357.38, but mistakenly forwarded to BBC. Prior to receiving the checks, BBC was unaware that WSEC was Christ's employer but believed the payments were from a voluntary wage assignment by Christ. BBC applied the proffered funds to debts it was collecting and suits which it had pending against Christ, even dismissing one lawsuit BBC had against Christ. The amounts received by BBC from WSEC were not enough to satisfy what was owed to BBC.

In the case of *In Re David & Laura Aughenbaugh, Debtors*, 2002 WL 33939738 (Bkrcty.D.Idaho), the bankruptcy court interpreted Idaho's garnishment statutes to determine whether wages, the subject of a garnishment notice served by the sheriff to debtors employer, remained the property of debtor, and thus subject to the automatic bankruptcy stay or whether, by virtue of the garnishment notice, were the property of the creditor or the sheriff and thus were no longer the property of the debtor and could be paid out to the creditor even after the filing of the bankruptcy. In that case monies, subject to the sheriff's garnishment notice, were held by the employer but before they were forwarded to the sheriff the debtors filed bankruptcy. In the case the court stated:

"In re Ducommun, 159 B.R. 919, 920, 93 I.B.C.R. 242, 243 (Bankr.D.Idaho 1993), explained:

A garnishment is "the process by which the garnishee is brought into court, and also that by which the defendant's credit or property is attached in the garnishee's hands. Its service is constructive seizure by notice. It is attachment in the hands of a third person." Eagleson v. Rubin, 16 Idaho 92, 100 P. 765, 767 (1909) (quoting Waples, Attachment and Garnishment § 469). Inland is correct in its assertion that service of the

writ of garnishment created a lien on the property held in the hands of the garnishee—here the Sheriff's Department. "By the service in the manner provided by statute, whether it be termed 'garnishment' or 'service of the attachment,' while the possession is not necessarily disturbed, 'a lien is obtained on defendant's title to the property in the hands of the garnishee.'" *Sullivan v. Mabey*, 45 Idaho 595, 264 P. 233, 236 (1928) (quoting *Kimball v. Richardson-Kimball Co.*, 111 Cal. 386, 43 P. 1111 (1896)). "The plaintiff in the attachment action obtained a lien upon the pledged property in the hands of the pledgee bank by virtue of the garnishment proceedings." *Fed. Res. Bank of San Francisco v. Smith*, 42 Idaho 224, 244 P. 1102, 1103 (1926). See also *Trustee, Ltd. v. Bowen-Hall, Inc. (In re Pro-Ida Foods, Inc.)*, 88 I.B.C.R. 219, 221-22 (Bankr.D.Idaho 1988) (noting that garnishment creates a lien for the purpose of an avoidable preference action under 11 U.S.C. § 547).

A similar discussion is found in *Fitzgerald v. Campbell (In re Greene)*, 92 I.B.C.R. 212 (Bankr.D.Idaho 1992). *Greene* addressed a continuing garnishment in the context of a preference action. The Court stated:

Service of the execution and Order did not irrevocably transfer all Debtors' rights in future proceeds to Defendants. Under Idaho's statutes, service of a garnishment on a party owing money to the judgment debtor simply creates a new liability in the third party to the judgment creditor until the judgment is satisfied. Idaho Code § 8-508. No Idaho court cases support this proposition but this Court has held that "[s]ervice of a garnishment in Idaho appears to create a lien upon property in the hands of the garnishee that is the subject of the garnishment...." *Trustee, Ltd. vs. Bowen-Hall, Inc.*, 88 I.B.C.R. 219, 221; see also *Delamere vs. Boyd*, 82 I.B.C.R. 203, 204. At best, then, as to Debtor's future proceeds, Defendants held a lien on those proceeds which was perfected as of the date of service of the paperwork on [the garnishee] by the sheriff. *Delamere*, 82 I.B.C.R. at 204."

The court adopts this language and finds in the instant case that the service of the garnishment documents by the Bonneville County Sheriff to WSEC did not create an ownership of the property in MRS, but a lien only. The funds sent to BBC from WSEC did not belong to, nor were they the property of Plaintiff, nor the Bonneville County Sheriff.

In the case of *Chavez v. Barrus*, 146 Idaho 212, 192 P.3d 1036 (S.Ct. 2008) the Idaho Supreme Court stated, "Under Idaho law, a lien is a charge upon property to secure payment of a debt and transfers no title to the property subject to the lien. I.C. § 45-109; I.C. § 45-101."

Since the monies forwarded to BBC did not belong to Plaintiff nor to the Sheriff, they remained the property of Christ or of WSEC and were forwarded to BBC. At no time was MRS the owner of the property.

For plaintiff to recover on any of its theories against this defendant, MRS would have to be considered the owner of the property (the \$1,083.21).

See *Peasley Transfer and Storage v. Smith* 132 Idaho 732 (1999) as to conversion “A right of action (of conversion) accrues in favor of the owner of the property...”

See *Erb v. Kohnke*, 121 Idaho 328 (Id.App. 1992) as to constructive trust, “. . . so that he cannot equitably retain the property which really belongs to another...” .

See *Vanderford Co., Inc. v. Knudson*, 144 Idaho 547 (2007) as to unjust enrichment “A prima facie case of unjust enrichment consists of three elements (1) There was a benefit conferred upon the defendant by the plaintiff...” (emphasis added). In the instant case, Plaintiff conferred no benefit on Defendant because Plaintiff had no benefit to confer.

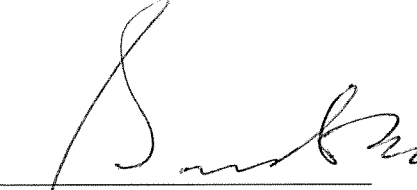
See *Idaho Code 18-2403 (1)* as to criminal conversion, “ A person steals property and commits theft when ...he wrongfully takes ... property from an owner thereof.”

Since MRS was not the owner of the \$1,083.21 MRS cannot prevail against this defendant in this case.

The court has also carefully reviewed the record as it pertains to the November 17, 2010 *Order on Settlement of Attorney Fees and Costs* and the November 17, 2010 *Judgment* and finds no error in the award of attorney fees and costs as set forth in those documents.

Therefore, there are no genuine issues of fact and Defendant is entitled to a judgment as a matter of law. Plaintiff’s complaint is dismissed and Plaintiff shall take nothing thereby. **All the previous orders herein as stated above are affirmed and are hereby the Order of the Court.**

Dated this 16th day of February 2011.

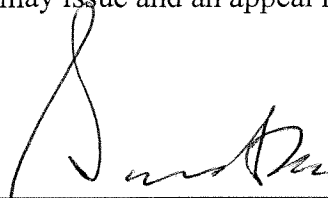


Steven A. Gardner
Magistrate Judge

RULE 54 (b) Certificate

This case has been fully resolved by this order and with respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with IRCP 54(b) that the court has determined that there is no just reason for the delay of the final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated this 16th day of February 2011.


Steven A. Gardner
Magistrate Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 16, 2011, I served a true and correct copy of the foregoing document to the following by mailing, with correct postage thereon, by facsimile, or by causing the same to be hand delivered.

| | |
|--|---|
| | |
| Plaintiff's Counsel: Bryan D. Smith P. O. Box 50731 Idaho Falls ID 83405 | <input type="checkbox"/> Courthouse Box <input type="checkbox"/> US Mail <input type="checkbox"/> FAX <input type="checkbox"/> Hand Delivery |
| | |
| Defendant's Counsel: Todd R. Erikson 3456 East 17th Street, Suite 280 Idaho Falls ID 83406 | <input type="checkbox"/> Courthouse Box <input type="checkbox"/> US Mail <input type="checkbox"/> FAX <input type="checkbox"/> Hand Delivery |
| | |



Deputy Clerk

Bryan N. Zollinger, Esq.
Idaho State Bar # 8008
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731

BONNEVILLE COUNTY
IDAHO
2011 FEB 23 PM 3:36

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BONNEVILLE

MEDICAL RECOVERY SERVICES, LLC, an
Idaho limited liability company,

Plaintiff,

vs.

BONNEVILLE BILLING AND COLLECTIONS,
INC, a Utah corporation,

Defendant.

Case No. CV-08-5817

**AMENDED COMPLAINT AND
DEMAND FOR JURY TRIAL**

COMES NOW plaintiff, Medical Recovery Services, LLC, and for a claim against
defendant, alleges as follows:

GENERAL ALLEGATIONS

1. The plaintiff, Medical Recovery Services, LLC ("MRS"), is, and at all times material herein was, a limited liability company organized under the laws of the State of Idaho doing business in Bonneville County, Idaho.
2. The defendant, Bonneville Billing and Collections, Inc. ("BB&C"), is, and at all times material herein was, a Utah corporation doing business in Bonneville County, Idaho.

3. On or about June 4, 2008, the plaintiff obtained a judgment against Stacie Christ for the amount of \$1,868.15.

4. On or about June 18, 2008, the plaintiff through the Bonneville County sheriff served a Writ of Execution and Notice of Continuing Garnishment on Stacie Christ's employer, Western States Equipment Company.

5. Between the period starting July 7, 2008 and ending August 7, 2008, Western States Equipment Company mistakenly sent three checks intended for the plaintiff totaling \$1,083.21 to the defendant, BB&C, rather than Bonneville County Sherriff's Department.

6. On or about August 20, 2008, the Bonneville County Sheriff informed the plaintiff that Western States Equipment Company had inadvertently sent the payments to the defendant and that the defendant had refused a request from Western States Equipment Company to return the money.

7. On or about August 21, 2008, the plaintiff sent a demand letter to the defendant demanding return of the money to Western States Equipment Company who would then forward it to the sheriff pursuant to the garnishment.

8. On or about August 29, 2008, the plaintiff received a response letter from the defendant admitting receipt of the payments from Western States Equipment Company and refusing to return the money. The defendant further admitted that it mistakenly received the money.

9. At the time this action was commenced, the plaintiff was the owner of, lienholder against, or otherwise entitled to the possession of the money mistakenly delivered to the defendant who refuses to return it.

COUNT I

(Claim and Delivery)

10. The plaintiff incorporates by reference paragraphs 1 through 9 as though set forth at length herein.

11. The plaintiff is the owner of the property claimed or is entitled to the possession thereof, having garnished the money, having attached the money, and having ownership of, a lien against, or otherwise being in possession of the money, but for a mistake in delivery to the defendant.

12. The defendant wrongfully detains the money from the plaintiff having come into possession as alleged herein.

13. The defendant continues to maintain possession of the money for the improper purpose of unfairly competing with the plaintiff and to exercise dominion and control over the money for the defendant's use and enjoyment to the exclusion of the plaintiff.

14. The property the defendant wrongfully detains is valued at \$1,083.21 and is in the possession of the defendant located at 431 River Parkway, Idaho Falls, Idaho.

15. The property the defendant wrongfully detains and that the plaintiff seeks has not been taken for a tax, assessment, or fine, pursuant to a statute or seized under an execution against the property of the plaintiff.

16. Accordingly, the plaintiff has suffered damages in an amount to be proven at trial and seeks a writ for return of the money that the defendant wrongfully detains.

COUNT II

(Lien Foreclosure)

17. The plaintiff incorporates by reference paragraphs 1 through 16 as though set forth at length herein.

18. By virtue of execution of the garnishment and attachment, the plaintiff has a lien against the money that the defendant wrongfully detains.

19. The plaintiff's lien rights are superior to the possessory interest of the defendant.

20. The plaintiff seeks foreclosure of its lien rights against the money the defendant wrongfully detains.

21. Accordingly, the plaintiff seeks an order or writ allowing the plaintiff to foreclose on the money the defendant wrongfully detains.

COUNT III

(Intentional Interference With A Prospective Economic Advantage)

22. The plaintiff incorporates by reference paragraphs 1 through 21 as though set forth at length herein.

23. The plaintiff had a valid economic expectation that it would receive the money it garnished and attached through legal processes.

24. The defendant had knowledge of the plaintiff's economic expectation that the plaintiff would receive the money it garnished and attached.

25. The defendant intentionally interfered with the plaintiff's economic expectation thereby terminating the plaintiff's economic expectation.

26. The defendant's interference was legally wrongful resulting in damages to the plaintiff.

COUNT IV

(CONVERSION)

27. The plaintiff incorporates by reference paragraphs 1 through 26 as though set forth at length herein.

28. The plaintiff was the legal owner of, lienholder against, and/or had the right of possession to the money that were inadvertently sent to the defendant described as:

1. Western States Equipment check no. 0708908235 for the amount of \$331.00.
2. Western States Equipment check no. 0708971963 for the amount of \$394.83.
3. Western States Equipment check no. 0808036464 for the amount of \$357.38.

29. The plaintiff has an absolute and unconditional right to the money that was inadvertently paid to the defendant.

30. The defendant, with knowledge of the plaintiff's interest in the money, took and unlawfully converted the money to the defendant's own use and benefit.

31. Upon discovering that the defendant had unlawfully converted the plaintiff's personal property, the plaintiff sent a demand letter on August 21, 2008 verifying the plaintiff's interest and demanding return of the money.

32. The defendant has admitted receiving the money and further has refused to return it or to reimburse the plaintiff for the value and has refused to do so up to the time of filing this suit.

33. As a result of the defendant's wrongful conduct as alleged herein, the plaintiff is entitled to recover from the defendant damages in the amount of \$1,083.21.

34. The defendant has taken and converted the personal property of the plaintiff willfully and maliciously, with reckless disregard for the plaintiff's rights. After demand was made on defendant to return the property or reimburse the plaintiff for its value, defendant willfully and maliciously, with reckless disregard for the plaintiff's rights, refused to return the property or reimburse the plaintiff. The defendant has even gone so far as to label the plaintiff's claim to return of its money as "frivolous."

COUNT V

(Unjust Enrichment)

35. The plaintiff incorporates by reference paragraphs 1 through 34 as though set forth at length herein.

36. The money the defendant received through mistake is in fact the property of the plaintiff, property in which the plaintiff has a lien, or property to which the plaintiff is entitled to possession.

37. The plaintiff has performed all conditions precedent to the maintenance an action for unjust enrichment.

38. As a result of the defendant's receipt of property belonging to the plaintiff, property in which the plaintiff has a lien, or property to which the plaintiff is entitled to possession that the defendant refuses to return to the plaintiff, the defendant has been unjustly enriched at the expense of the plaintiff in the amount of \$1,083.21.

COUNT VI

(Constructive Trust)

39. The plaintiff incorporates by reference paragraphs 1 through 38 as though set forth at length herein.

40. The defendant wrongfully possesses the above-described property worth \$1,083.21 belonging to the plaintiff who is the rightful owner, lienholder, or rightfull possessor. As such, the defendant rightfully owes the plaintiff the sum of \$1,083.21 for the money that the defendant has wrongfully detained.

41. Accordingly, the plaintiff is entitled to relief in the form of a constructive trust imposed on the defendant for the sum of \$1,083.21 plus costs, interest and any other sums deemed equitable, for the benefit of the plaintiff.

COUNT VII

(Attorney's Fees)

42. The plaintiff incorporates by reference paragraphs 1 through 41 as though set forth at length herein.

43. As a direct and proximate result of defendants' wrongful conduct as herein alleged, plaintiff has been required to retain an attorney and incur attorney's fees and costs of suit, which plaintiff is entitled to recover from defendant pursuant to Idaho Code §§ 12-120 and 12-121, and Rule 54(d) of the Idaho Rules of Civil Procedure, and all other applicable Idaho law and rules. In this regard, the plaintiff made demand upon the defendant for payment of damages within the meaning of Idaho Code § 12-120(1) and is entitled to recover attorney's fees under this

code section because the defendant failed to pay the plaintiff any amount pursuant to the plaintiff's demand.

WHEREFORE, plaintiff prays for judgment against defendants as follows:

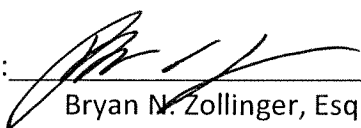
1. For judgment against the defendant for damages for the sum of \$1,083.21;
2. For judgment ordering disgorgement of plaintiff's funds unjustly retained by the defendant in the sum of \$1,083.21;
3. For a writ to be issued ordering the Bonneville County Sheriff to attach, garnish, or otherwise execute on the \$1,083.21 that the defendant wrongfully detains;
4. For a judgment of foreclosure allowing the plaintiff to foreclose its lien against the \$1,083.21 the defendant wrongfully detains;
5. For the creation of a constructive trust to hold the plaintiff's money improperly retained by defendant as a result of defendant's wrongful conduct;
6. For judgment awarding the plaintiff attorney's fees in the amount of \$1,000 if the plaintiff takes judgment by default or in the amount awarded by the court if the plaintiff takes judgment other than by default;
7. For an order allowing the plaintiff to amend this amended complaint to allege a claim for punitive damages;
7. For judgment awarding costs of suit; and
8. For such other and further relief as to the court seems just and equitable in the premises.

176

DATED this 23rd day of February, 2011.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: _____

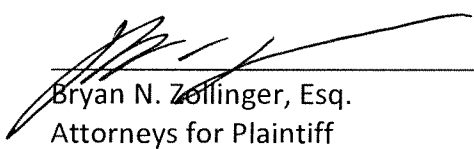

Bryan N. Zollinger, Esq.
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

COMES NOW plaintiff, Medical Recovery Services, LLC, and makes demand for a jury trial of the issues in the above-entitled action pursuant to Rule 38 of the Idaho Rules of Civil Procedure.

DATED: 23rd February, 2011.

SMITH, DRISCOLL & ASSOCIATES, PLLC


Bryan N. Zollinger, Esq.
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MEDICAL RECOVERY SERVICES, LLC)

Plaintiff,)

vs.)

BONNEVILLE BILLING &)
COLLECTIONS, INC)

Defendant.)

CASE NO: CV 08-5817

**Order on Motion for Reconsideration
and Motion to File an Amended
Complaint**

This case stems from a collection action originally brought by Medical Recovery Services, LLC (hereinafter "MRS") against Stacey Christ, wherein in that case, Bonneville County Case number CV-08-2399, MRS obtained a judgment against Ms. Christ in the sum of \$1,877.23. MRS sought to collect the judgment in that case through the Bonneville County Sheriff serving a Notice of Continuing Garnishment and a Writ of Execution on Christ's employer Western States Equipment Company (hereinafter "WSEC"). WSEC identified and withheld some wages of Christ and sent them not to the Bonneville County Sheriff pursuant to the Writ of Execution but sent to Bonneville Billing and Collections, Inc. (hereinafter "BBC"), by mistake, three checks totaling \$1,083.21.

As it turned out BBC also had claims against Christ for which lawsuits had been filed. BBC applied the \$1,083.21 from WSEC to the debts owed to BBC and dismissed one of the lawsuits it had against Christ before learning that the monies had been forwarded by WSEC by mistake. MRS has sued BBC herein seeking a judgment for the \$1,083.21 and costs and attorney fees.

178

On June 4, 2009 the court herein denied the motion of MRS for summary judgment and upon being asked to reconsider the decision the court again on June 29, 2010 denied the relief requested by MRS. Thereafter BBC filed a Motion for Summary Judgment, on the same facts, which summary judgment was granted, dismissing the complaint of MRS. Judgment for attorney fees and costs was entered in favor of BBC on November 17, 2010.

On December 1, 2010 the court was again asked by MRS to reconsider the prior orders herein. On February 16, 2011 the court issued its *Order on Reconsideration* affirming all prior orders herein.

The instant matter is before the court on MRS's *Motion for Reconsideration* of the Court's *Order on Reconsideration* dated February 16, 2011 and a *Motion to File an Amended Complaint*. Both motions are contained in a single document filed February 23, 2011. MRS has also filed an *Amended Complaint and Demand for Jury Trial* on February 23, 2011.

The court, prior to issuing its February 16, 2011 *Order on Reconsideration* made a thorough review of all prior proceedings herein, the facts and the law pertaining to this case and finds nothing in the instant *Motion for Reconsideration* which would suggest that the February 16, 2011 *Order on Reconsideration* should be modified.

"The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court." Jordan v. Beeks, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). We consider: "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." Lettunich v. Lettunich, 145 Idaho 746, 749, 185 P.3d 258, 261 (2008).

Against these criteria the court perceives this issue to be one of discretion, understands the boundaries of the discretion, believes the case has been appropriately considered by the court in previous decisions herein, and that the arguments made by counsel in their Brief in support of the instant *Motion for Reconsideration* do not add anything of substance to the case.

As to the *Motion to File an Amended Complaint*, Idaho Rule of Civil Procedure 15(a) allows parties to amend a pleading on leave of the court and that “leave should be freely given when justice so requires”. Idaho R. Civ. P. 15 (a). The Idaho Supreme Court has made it clear that leave to amend is a matter within the trial court’s discretion. Indian Springs LLC v. Indian Springs Land Inv., LLC, 147 Idaho 737, 750, 215 P.3d 457, 470 (2009). This standard applies even after the trial court has entered summary judgment. In Indian Springs the trial court denied the defendant’s post-summary judgment motion to amend the pleading. The Idaho Supreme Court upheld the trial court’s determination using the traditional abuse of discretion standard. *Id.* Proper application of discretion involves: “(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.” Indian Springs, 147 Idaho at 750 (quoting Silver Creek Computers, Inc. v. Petra, Inc., 136 Idaho 879, 881, 42 P.3d 672, 674 (2002)).

Against this standard this court perceives this issue as a matter of discretion.

As to the second criteria the court notes that this case was filed in September 2008, and there has been considerable time for discovery and for the parties to perfect their claims. Requests for Admission and answers to such have been exchanged, and MRS has conducted a deposition of BBC’s agent. MRS filed a Separate Statement of Undisputed Facts in Support of

180

Motion for Summary Judgment on March 19, 2009 to which BBC concurred on April 21, 2009. On April 21, 2011 BBC provided some additional facts which MRS asserted were not material (Plaintiff's Reply Brief filed May 5, 2009). In other words, the parties do not disagree regarding the basic facts of the case. MRS sought a summary judgment in its favor as a substitute for trial and to complete the case entirely, on its merits, which was denied. BBC thereafter sought a summary judgment which was granted. The November 17, 2010 Judgment of \$10,658.00 against MRS has been executed upon by BBC and that as of March 3, 2011 there had been \$7,481.00 collected by BBC and that \$3,396.68 remained uncollected from MRS as of that date.

Given the foregoing, the court finds that the *Motion to File an Amendment Complaint* is untimely. It is simply an attempt by MRS to circumvent the effects of the unfavorable summary judgment, the method MRS itself chose to try to complete this case without trial and the November 17, 2010 *Judgment*, both to the favor of BBC previously entered by the court. The proposed amended complaint is not based upon newly discovered evidence but upon facts well known to both parties since before the action herein was commenced by MRS.

The court further finds that the proposed amended complaint is and has been made for the sake of delaying the consequences of the prior orders herein.

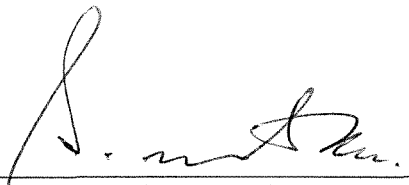
In the Indian Springs case, the Idaho Supreme Court upheld the trial court's denial of a motion filed by some of the defendants (the Andersons) to amend their pleading, after summary judgment had been returned against them. The court stated,

"Here, we find that the district court's decision to deny the Andersen's motion to add a counterclaim may be sustained on the ground of untimeliness. The only reason the Andersen's provide for waiting to add a counterclaim is that they thought title was the more important issue

until after the court's entry of summary judgment. The motion was not based on newly discovered evidence, but rather on facts known to the Andersens even before the action was commenced. Furthermore, the district court determined that the Andersens' motion to amend their complaint was "simply an additional attempt by [the Andersens] to circumvent the summary judgment decision previously entered by the [district court]." This Court has held that if a trial court finds bad faith or a dilatory motive on the part of the movant, leave to amend the pleadings should not be granted. Smith v. Great Basin Grain Co., 98 Idaho 266, 272, 561 P.2d 1299, 1305 (1977). Therefore, we affirm the district court's denial of the Andersens' motion to amend the pleadings . . ."

Based upon the foregoing, it is hereby ordered that the *Motion for Reconsideration* and the *Motion to File an Amended Complaint* filed February 23 2011 are both hereby DENIED.


Dated this 29th day of April 2011


Steven A. Gardner, Magistrate Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 29, 2011, I served a true and correct copy of the foregoing document to the following by mailing, with correct postage thereon, by facsimile, or by causing the same to be hand delivered.

| | |
|--|--|
| | |
| Plaintiff's Counsel: Bryan D. Smith P. O. Box 50731 Idaho Falls ID 83405 | <input checked="" type="checkbox"/> Courthouse Box <input type="checkbox"/> US Mail <input type="checkbox"/> FAX <input type="checkbox"/> Hand Delivery |
| | |
| Defendant's Counsel: Todd R. Erikson 3456 East 17th Street, Suite 280 Idaho Falls ID 83406 | <input checked="" type="checkbox"/> Courthouse Box <input type="checkbox"/> US Mail <input type="checkbox"/> FAX <input type="checkbox"/> Hand Delivery |



Deputy Clerk

Bryan D. Smith, Esq.
Idaho State Bar # 4411
Bryan N. Zollinger, Esq.
Idaho State Bar # 8008
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731

BONNEVILLE COUNTY
11 MAY -3 PM 4:15

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MEDICAL RECOVERY SERVICES, LLC, an
Idaho limited liability company,

Plaintiff,

vs.

BONNEVILLE BILLING AND COLLECTIONS,
INC, a Utah corporation,

Defendant.

Case No. CV-08-5817

NOTICE OF APPEAL

Fee Category: L.2.
Filing Fee: \$53.00

**TO: THE ABOVE NAMED RESPONDENT, BONNEVILLE BILLING AND COLLECTIONS, INC., AND
TO THE CLERK OF THE ABOVE-ENTITLED COURT:**

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant, Medical Recovery Services, LLC, appeals against the above-named respondent, Bonneville Billing and Collections, Inc., to the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, from the Court's Judgment entered November 17, 2010 by Linda J. Cook, Magistrate Judge, from the Court's Order on Reconsideration entered February 16, 2011, and from the Court's Order on

Motion for Reconsideration and Motion to File an Amended Complaint entered April 29, 2011 entered April 29, 2011 by Steven A. Gardner, Magistrate Judge.

2. Appellant has the right to appeal to the District Court, and the memorandum decisions, orders, and judgment described in paragraph 1 above which are subject to appeal pursuant to Rule 11(a), Idaho Appellate Rules.

3. The issues which the appellant intends to assert in the appeal are the following:

a. Did the magistrate court commit reversible error when it found that Bonneville Billing and Collections has not converted MRS' property interest?

b. Did the magistrate court commit reversible error when it found that Bonneville Billing and Collections has not been unjustly enriched at the expense of MRS?

c. Did the magistrate court abuse its discretion in refusing to allow MRS to file an amended complaint?

4. There has been no order entered sealing any portion of the record in this case.

5. The appellant requests no transcript be prepared on appeal.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, Idaho Appellate Rules: The entire magistrate court file.

7. I certify:

(a) That the appellate filing fee has been paid;

(b) That service has been made upon all parties required to be served pursuant to Rule 20, Idaho Appellate Rules.

DATED this 3rd day of May, 2011.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 

Bryan D. Smith
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of May, 2011, I caused a true and correct copy of the forgoing **NOTICE OF APPEAL** to be served, by placing the same in a sealed envelope and depositing it in the U.S. Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

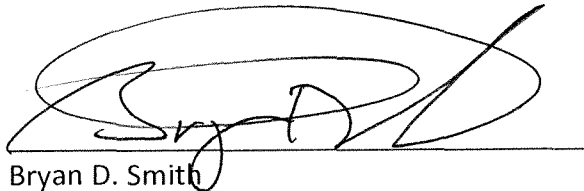
PARTIES SERVED:

- ☒ U.S. Mail
- ☐ Facsimile Transmission
- ☐ Overnight Delivery
- ☐ Hand Delivery
- ☐ Courthouse Mail Box

Todd R. Erikson, Esq.
3456 East 17th Street, Suite 280
Idaho Falls, Idaho 83405

- ☒ U.S. Mail
- ☐ Facsimile Transmission
- ☐ Overnight Delivery
- ☐ Hand Delivery
- ☐ Courthouse Mail Box

Ronald Longmore
Clerk of Court
605 N. Capital Avenue
Idaho Falls, Idaho 83402


Bryan D. Smith

Bryan D. Smith, Esq.
Idaho State Bar # 4411
Bryan N. Zollinger, Esq.
Idaho State Bar # 8008
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731

BONNEVILLE COUNTY
11 JUL 11 11:33:34

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MEDICAL RECOVERY SERVICES, LLC, an
Idaho limited liability company,

Plaintiff,

vs.

BONNEVILLE BILLING AND COLLECTIONS,
INC, a Utah corporation,

Defendant.

Case No. CV-2008-0005817

APPELLATE BRIEF

I. INTRODUCTION.

This matter comes before the court on appeal from the Magistrate Court's Judgment dated November 17, 2010 against plaintiff Medical Recovery Services ("MRS") entered pursuant to the Magistrate Court's Order dated August 24, 2010 granting defendant's, Bonneville Billing and Collections' ("BB&C"), motion for summary judgment.

187

II. FACTUAL AND PROCEDURAL HISTORY.

| DATE: | EVENT: |
|----------------|--|
| April 23, 2008 | MRS files a complaint against Stacie Christ in case number CV-08-2399; ¹ |
| June 4, 2008 | MRS obtains judgment against Stacie Christ for the amount of \$1,868.15; ² |
| June 12, 2008 | MRS obtains an order for continuing garnishment against Stacie Christ's employer, Western States Equipment Company (hereinafter "WSEC"); ³ |
| June 18, 2008 | MRS, through the Bonneville County Sheriff, serves a Writ of Execution and Notice of Continuing Garnishment on Stacie Christ's employer, WSEC; ⁴ |
| June 23, 2008 | WSEC returns the Acknowledgement of Receipt of Garnishment to the Bonneville County Sheriff; ⁵ |
| July 10, 2008 | WSEC inadvertently sends Check No. 0708908235 in the amount of \$331.00 to defendant, BB&C, rather than to the Bonneville County Sheriff. The mistake was the result of BB&C being sequentially next to "Bonneville County Sheriff" on a pull-down computer menu; ⁶ |
| July 24, 2008 | WSEC inadvertently sends Check No. 0708971963 in the amount of \$394.84 to defendant, BB&C, rather than to the Bonneville County Sheriff. The mistake was the result of BB&C being sequentially next to "Bonneville County Sheriff" on a pull-down computer menu; ⁷ |
| August 7, 2008 | WSEC inadvertently sends Check No. 0808036464 in the amount of \$357.38 to defendant, BB&C, rather than to the Bonneville County Sheriff. The mistake was the result of BB&C being sequentially next to "Bonneville County Sheriff" on a pull-down |

¹ See Magistrate Court file.

² See Magistrate Court file.

³ See Magistrate Court file.

⁴ See Magistrate Court file.

⁵ See Magistrate Court file.

⁶ See Magistrate Court file.

⁷ See Magistrate Court file.

computer menu;⁸

| | |
|-----------------|---|
| August 20, 2008 | Bonneville County Sheriff Deputy, Sherrie Berggren, informs MRS, via letter, that Alice Hannaford, the payroll administrator for WSEC, had informed her that WSEC had mistakenly sent the checks to BB&C rather than to the Bonneville County Sheriff and that Alice Hannaford had spoken to Clayne Bodily, the office manager of BB&C, and explained the mistake and that Mr. Bodily chose to keep the money; ⁹ |
| August 21, 2008 | MRS sends a demand letter to BB&C explaining the situation and demanding that it return the \$1,083.21 to WSEC within ten days; ¹⁰ |
| August 28, 2009 | BB&C sends a response letter to MRS stating that it had received the above described checks and that it refuses to return the \$1,083.21 to WSEC; ¹¹ |
| Sept. 18, 2008 | MRS files a complaint against BB&C in the current action in Bonneville County for conversion and unjust enrichment; ¹² |
| Nov. 6, 2008 | BB&C admits that before the filing of this action, it had knowledge that WSEC inadvertently sent the checks to it; ¹³ |
| March 19, 2009 | MRS files a Motion for Summary Judgment, Notice of Hearing, Brief in Support of Motion for Summary Judgment, Affidavit of Bryan N. Zollinger, and Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment; ¹⁴ |
| June 4, 2009 | The court enters the order denying MRS' motion for summary judgment; ¹⁵ |
| June 11, 2009 | The court enters judgment against MRS; ¹⁶ |
| July 20, 2009 | MRS files its notice of appeal. ¹⁷ |

⁸ See Magistrate Court file.

⁹ See Magistrate Court file.

¹⁰ See Magistrate Court file.

¹¹ See Magistrate Court file.

¹² See Magistrate Court file.

¹³ See Magistrate Court file.

¹⁴ See Magistrate Court file.

¹⁵ See Magistrate Court file.

¹⁶ See Magistrate Court file.

¹⁷ See Magistrate Court file.

| | |
|------------------|--|
| August 17, 2009 | MRS files its appellate brief. ¹⁸ |
| October 7, 2009 | BB&C files its Appellate/Respondent's brief. ¹⁹ |
| October 26, 2009 | MRS files its Appellate reply brief. ²⁰ |
| Nov. 5, 2009 | MRS files Augmentation of Appellate Brief. ²¹ |
| Nov. 19, 2009 | The District Court issues Notice of Intent to Dismiss Appeal for Lack of Jurisdiction. ²² |
| Nov. 25, 2009 | MRS files Motion to Vacate Partial Judgment and Brief in Support of Motion to Vacate Partial Judgment with the Magistrate Court. ²³ |
| Dec. 11, 2009 | District court enters Order of Dismissal for the appellate case. ²⁴ |
| April 8, 2010 | MRS files Motion for Reconsideration and Brief in Support of Motion for Reconsideration. ²⁵ |
| May 12, 2010 | BB&C files its Supplemental Brief on its Motion for Summary Judgment. ²⁶ |
| July 7, 2010 | The court enters its Order on Motion to Reconsider, denying the motion. ²⁷ |
| August 24, 2010 | The court enters Order granting Summary Judgment for BB&C. ²⁸ |
| Sept. 3, 2010 | BB&C files its Memorandum of Costs and Attorney Fees. ²⁹ |
| Sept. 27, 2010 | MRS files its Objection to Defendant's Memorandum of Costs and Attorney Fees and Affidavit of Bryan Zollinger. ³⁰ |

¹⁸ See District Court appellate file.

¹⁹ See District Court appellate file.

²⁰ See District Court appellate file.

²¹ See District Court appellate file.

²² See District Court appellate file.

²³ See Magistrate Court file.

²⁴ See District Court appellate file.

²⁵ See Magistrate Court file.

²⁶ See Magistrate Court file.

²⁷ See Magistrate Court file.

²⁸ See Magistrate Court file.

²⁹ See Magistrate Court file.

³⁰ See Magistrate Court file.

| | |
|-------------------|--|
| Nov. 17, 2010 | The court enters judgment and issues the Order on Settlement of Attorney Fees and Costs, requiring MRS to pay attorney fees and costs in the amount of \$10,658.00. ³¹ |
| Dec. 1, 2010 | MRS files a Motion for Reconsideration. ³² |
| January 13, 2011 | MRS files its Brief in Support of Motion for Reconsideration. ³³ |
| January 31, 2011 | BB&C files Objection to Motion for Reconsideration. ³⁴ |
| February 1, 2011 | MRS files Brief in Reply to Objection to Motion for Reconsideration. ³⁵ |
| February 16, 2011 | The court issues Order on Reconsideration, denying Motion for Reconsideration, upholding Summary Judgment for BB&C. ³⁶ |
| February 23, 2011 | MRS files Motion for Reconsideration, Brief in Support of Motion for Reconsideration, Motion to File an Amended Complaint, Brief in Support of Motion to File an Amended Complaint, and Amended Complaint and Demand for Jury Trial. ³⁷ |
| April 29, 2011 | The court issues Order on Motion for Reconsideration and Motion to File an Amended Complaint. ³⁸ |
| May 3, 2011 | MRS files Notice of Appeal. ³⁹ |

III. STANDARD OF REVIEW.

“On appeal from the grant of . . . summary judgment, this Court’s standard of review is the same as the standard used by the . . . [magistrate] court originally ruling on the motion.”

P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust, 144 Idaho 233, 237 (2007). That standard

³¹ See Magistrate Court file.

³² See Magistrate Court file.

³³ See Magistrate Court file.

³⁴ See Magistrate Court file.

³⁵ See Magistrate Court file.

³⁶ See Magistrate Court file.

³⁷ See Magistrate Court file.

³⁸ See Magistrate Court file.

³⁹ See Magistrate Court file.

is stated in Idaho Rule of Civil Procedure 56(c), which states that “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.” As such, “[t]his Court exercises free review over the entire record that was before the . . . [magistrate] judge to determine whether either side was entitled to judgment as a matter of law and reviews the inferences drawn by the [magistrate] judge to determine whether the record reasonably supports those inferences.” *P.O. Ventures*, 144 Idaho at 237.

IV. ISSUES ON APPEAL.

- A. Did the Magistrate Court commit reversible error when it ruled that MRS’ Lien Was Not Property BB&C Could convert?
- B. Did the Magistrate Court commit reversible error when it found that BB&C has not been unjustly enriched through the collection efforts of MRS?
- C. Did the Magistrate Court commit reversible error when it found that BB&C does not hold the garnished wages in a constructive trust for the benefit of MRS?
- D. Did the Magistrate Court commit reversible error when it denied MRS’ Motion to Amend the Complaint?
- F. Is MRS entitled to an award of costs and attorney's fees on appeal?
- G. Should the Court order BB&C To Return The Money It Garnished From MRS?

V. MRS HAS A RIGHT OF OWNERSHIP AND POSSESSION TO STACIE CHRIST'S GARNISHED WAGES SUPERIOR TO ANY RIGHT OF BB&C.

Central to the Court's analysis is whether MRS had any property right in the proceeds BB&C received. If MRS has a property right greater than BB&C's property right, then the Court should determine that BB&C converted MRS’ property for the undisputed value of the property.

For the reasons set forth below, the writ of garnishment MRS served upon WSEC against Stacie Christ's wages created in MRS a property right in the garnished wages superior to any property right in BB&C.

The Idaho Supreme Court has stated that "an attachment, duly and regularly issued and levied, **becomes a lien on the property**. . . ." *Potlatch Lumber Co. v. Runkel*, 16 Idaho 192, 101 P. 396, 398 (1909) (emphasis added); see also *Federal Reserve Bank of San Francisco v. Smith*, 42 Idaho 224, 244 P. 1102, 1103 (1926) ("The plaintiff in the attachment action obtained a lien upon the pledged property in the hands of the pledgee bank by virtue of the garnishment proceedings.") Furthermore, "[g]arnishment . . . is the process by which the garnishee is brought into court, and also that by which the defendant's credit or property is attached in the garnishee's hands. **Its service is constructive seizure by notice**. It is attachment in the hands of a third person." *Eagleson v. Rubin*, 16 Idaho 92, 100 P. 765, 767 (1909) (emphasis added). Additionally, "[u]pon the levy of a writ of attachment **the property attached is in the custody of the law**, held to meet and pay any judgment which the attaching creditor may recover and **possession of the attached property vests in the officer until the property is disposed of**." *Letz v. Letz*, 215 P.2d 534, 538 (Mont. 1950) (emphasis added). "A sheriff serving a writ of attachment is an officer of the court . . . [and] [h]e is the agent of the attaching creditor and the attached property in the custody of the sheriff **is constructively in the possession of the attaching creditor**." *Bass v. Stodd*, 357 F.2d 458, 464 (9th Cir. 1966) (emphasis added). Lastly, the attaching creditor's lien becomes "perfected as of the date of service of the paperwork on the garnishee by the sheriff." *In re Aughenbaugh*, 2002 WL 33939738, 4 (Bkrtcy.D.Idaho 2002); see also *Kaesemeyer v. Smith*, 22 Idaho 1, 123 P. 943, 948 (1912) ("[T]he garnishment of the

bank before such check has been presented creates a lien on the deposit superior to that of the payee of the check.”)

As the attaching creditor and by virtue of the Bonneville County Sheriff acting as its “agent,” MRS received a perfected lien upon the wages of Stacie Christ on June 18, 2008, the date that MRS’ agent (the Bonneville County Sheriff) served the writ of execution on WSEC. As of this date, MRS’ agent had “constructively seized” the wages, or property, of Stacie Christ that WSEC held, and those wages were then in the “legal custody” and “constructive possession” of MRS’ agent, being held “to pay and meet” MRS’ judgment. Moreover, MRS’ lien upon the wages was “superior” to any property interest BB&C may have, as BB&C did not have any property interest in the wages—not a lien and not even right of possession having come into possession only by accident and only after MRS perfected its lien. Even the Magistrate Court agreed that MRS had a lien on the garnished wages.⁴⁰

VI. BB&C CONVERTED MRS’ LIEN INTEREST.

A. A Lien In Property Is An Interest BB&C Can Convert.

The Supreme Court of Idaho has stated:

“Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial or inconsistent with his rights therein, such as a tortuous taking of another's chattels, or ***any wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of the possession, permanently or for an indefinite time.*** The act must be essentially tortuous, but it is not essential to conversion sufficient to support the action of trover that the defendant should have complete manucaption of the property, or that he apply the property to his own use, if he has exercised dominion over it, in exclusion of, in defiance of, or inconsistent with the owner's right.” 26 R. C. L. 1098, § 3.

“In other words, conversion is ***a dealing by a person with chattels not belonging to him, in a manner inconsistent with the rights of the owner.***”

⁴⁰ See February 16, 2011 Order On Reconsideration, p.3.

Schlieff v. Bistline, 52 Idaho 353, P.2d 726, 728 (1932) (emphasis added).

“A right of action accrues in favor of the owner of property as soon as the property is **wrongfully taken from his possession or wrongfully converted.**” *Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732, 743 (1999). Furthermore, intent is not a necessary element of conversion, rather only a positive act of dominion over another's property is all that is required. *Id.* “An actor may be liable where he has in fact exercised dominion or control, **although he may be quite unaware of existence of rights with which he interferes**, and a defendant's intention, good or bad faith, and his knowledge or mistake are immaterial.” *Id.* (emphasis added). “[N]o evidence of a conversion exists until there is proof, first, that a proper demand for possession was made by the one who is entitled thereto and, second, that the possessor wrongfully refused delivery.” *Id.*

Neither title nor possession is required to support a claim of conversion. “A plaintiff in a conversion action must establish that he had title to the property **or had the right to possess the property at the time of the conversion,**” *Western Idaho Production Credit Ass'n v. Simplot Feed Lots, Inc.*, 106 Idaho 260, 678 P.2d 52 (1984) (citing *National Produce Distributors v. Miles & Meyer, Inc.*, 75 Idaho 460, 274 P.2d 831 (1954) (emphasis added)).

Courts outside of Idaho have been even more specific in stating that a lien meets the “right to possess” requirement and supports a claim of conversion. In this regard, “[o]wnership” is a flexible term and includes a range of interests including proprietary interest and mere possessory rights:

[A]ny person who has a right to possession superior to that of a taker, obtainer or withholder,” a definition used for purposes of larceny, robbery and related offenses. Our case law further acknowledges that “[t]he term owner is one of general application and

includes one having an interest other than the full legal and beneficial title.... The word owner is one of flexible meaning, and it varies from an absolute proprietary interest to a mere possessory right.... It is not a technical term and, thus, is not confined to a person who has the absolute right in a chattel, but also applies to a person who has possession and control thereof. (Internal quotation marks omitted)

Payne v. TK Auto Wholesalers, 98 Conn.App. 533, 911 A.2d 747, 752 (2006). (citing *Label Systems Corp. v. Aghamohammadi*, 270 Conn. 291, 329, 852 A.2d 703 (2004).

In *U.S. v. Haviland Agricultural Chemical Company*, 489 F.Supp. 42 (W.D. Michigan, 1980), a debtor sold farm machinery securing a loan from plaintiff, an agency of the United States Government. The debtor then used the money to pay another creditor, the defendant, who refused to return the money. The court allowed that the refusal could meet the requirements of conversion stating:

“An action for conversion has been stated by the plaintiff, specifically as follows:¶
10. On or about January 26, 1974 the aforesaid Irving Salow turned over \$1,706.94 of the sale proceeds unlawfully to the defendant. Thereby defendant converted to its own use property belonging to plaintiff...this Court concludes that the lien interest, whether perfected or not, is a property interest...”

(*Id.* at 43).

A lien constitutes a sufficient interest in personal property to support a conversion claim. *Imperial Valley L. Co. v. Globe G. & M. Co.*, 187 Cal. 352, 353-54, 202 P. 129 (1921). A third party may be liable for conversion where the third party interferes with a lienholder’s right in the property. *Hartford Financial Corp. v. Burns*, 96 Cal.App.3d 591, 158 Cal.Rptr. 169 (1979). “A mere contractual right is not sufficient for conversion, but a lien is.” *Farmers Ins. Exchange v. Zerin*, 53 Cal. App. 4th 445, 61 Cal.Rptr.2d 707 (1997). *See also Case Corp. v. Gehrke*, 208 Ariz. 140, 91 P.3d 362 (App. 2004) (A retailer's use of sale proceeds gave rise to a viable conversion claim because the lienholder had a security interest in such proceeds.) “[P]roperty interest may

be shown by a possession or ***a present right to possession when the defendant cannot show a better right...***" *Buck v. Gillham*, 80 Ark. App. 375, 96 S.W.3d 750 (Ct. App. 2003) (emphasis added).

In *Tzovolos v. Wiseman*, 51 Conn. Supp. 532 (2007) (*aff'd* in 300 Conn. 247, 12 A.3d 563 (2011)), the court ruled that defendants had converted a lender's security interest in property when they took restaurant equipment. *Id.* at 569. The lender on the equipment had a perfected purchase money security interest. *Id.* The defendants took the equipment to satisfy the debt borrower owed them, and refused to return the property even after a verbal demand notifying them of the higher priority lien. *Id.* at 569-70. Furthermore, defendants told the lender that if he sought to recover the property, the legal fees would cost more than the property was worth. *Id.* at 571.

The court ruled that "[a]lthough proof of absolute and unqualified title is... sufficient, proof of an ***immediate right to possession at the time of conversion is all that is required*** in the way of title or possession to enable the plaintiff to recover." *Id.* at 568. (emphasis added).

BB&C is analogous to the defendants in *Tzovolos* because they too refused to return the property after demand. MRS sent a demand letter to BB&C explaining that BB&C received MRS' garnished proceeds and demanding that it return the \$1,083.21 to WSEC within ten days.⁴¹ In response, BB&C sent a letter to MRS stating that it had received the garnished proceeds and that it ***refused*** to return the \$1,083.21 to WSEC.⁴² It is BB&C's exercise of dominion and control over the money belonging to MRS inconsistent with MRS' rights after MRS put BB&C on notice

⁴¹ See Plaintiff's Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment, Fact No. 10.

⁴² See Plaintiff's Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment, Fact No. 11.

that makes BB&C's conduct a wrongful conversion.

By virtue of its lien, MRS has established better ownership to the garnished wages than BB&C. MRS has shown a present right to possession, and BB&C has exercised wrongful dominion over the property in denial or derogation of and inconsistent with the superior right of MRS.

B. The Court Erred When It Ruled MRS' Lien Is Not A Property Right BB&C Could Convert.

In its Order On Reconsideration dated February 16, 2011, the Magistrate Court held that "the service of the garnishment documents by the Bonneville County Sherriff to WSEC did not create an ownership of the property in MRS, but a lien only."⁴³ The Magistrate Court relied on *Chavez v. Barrus*, 146 Idaho 212, for its position that MRS' lien does not create ownership in Christ's garnished wages. The court fundamentally misstated the holding of that case.

In *Chavez*, under a divorce decree, the wife had a lien on personal property sale proceeds from the sale of the house that husband received in the divorce. *Id.* at 216. Husband extinguished the lien through execution of a judgment against wife. *Id.* Wife then sought quiet title to the proceeds from husband's refinancing the house and half of the real property interest. *Id.* at 217. The court held that the wife held only a personal property lien which conferred no interest in the underlying real property. *Id.* at 221. In other words, she owned only the money, not the realty, and she didn't even own the money after the extinguishment. The court stated that "a lien transfers no title to the property subject to the lien" because her lien in the sale proceeds never transferred to her any interest (lien or otherwise) in the underlying real property. *Id.*

⁴³ See February 16, 2011 Order On Reconsideration, p.3.

The wife in *Chavez* had no claim to the real property. She had a lien that attached only to the real property sale proceeds. This explains why the court in *Chavez* stated that the wife's lien did not create ownership in the real property. *Chavez* does not say that a lien is not a property right another can convert. For these reasons, *Chavez* does not apply.

C. BB&C Converted MRS' Lien Interest.

The plaintiff in a conversion action merely needs a better right to the personal property sought than the defendant. *Western Idaho*, 106 Idaho 260, *Buck*, 80 Ark. App. 375. BB&C claims that its right to possession stems from having a collection account for Stacie Christ, but it is clear that MRS' right is superior because the garnishment was for the benefit of MRS, and BB&C was the inadvertent recipient who refused to return MRS' money. BB&C's actions meet the requirements of conversion, particularly because the Magistrate Court ruled that MRS has a lien on the garnished wages.⁴⁴

VII. BB&C'S CONDUCT AMOUNTS TO UNJUST ENRICHMENT.

A. BB&C Has Been Unjustly Enriched By MRS' Efforts.

Unjust enrichment "allows recovery where the defendant has received a benefit from the plaintiff that would be inequitable for the defendant to retain without compensating the plaintiff for the value of the benefit." *Farrell v. Whiteman*, 146 Idaho 604, 200 P.3d 1153, 1161 (2009). In order to establish a prima facie case for unjust enrichment, the plaintiff must establish that three elements exist: "(1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without

⁴⁴ See February 16, 2011 Order On Reconsideration, p.3.

payment to the plaintiff of the value thereof.” *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 88 (1999). see also *Hummel v. Hummel*, 14 N.E.2d 923, 927 (Ohio 1938) (“Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.”).

Here (1) MRS conferred a benefit upon BB&C by filing suit, obtaining judgment, and garnishing wages from Stacie Christ on whom BB&C had a collection account and from whose employer BB&C serendipitously received three checks in the amount of \$1,083.21—all without having to lift a finger; (2) BB&C has “appreciated” the benefit because BB&C has accepted and retained the money from the three checks; and (3) BB&C has accepted the checks under circumstances that would be inequitable for BB&C to retain them without payment to MRS for their value because the money is a windfall for BB&C to the detriment of MRS who is still uncompensated for the effort, cost and expense of obtaining the funds.

In *Chinchurreta v. Evergreen Management, Inc.*, 117 Idaho 591, Chinchurreta obtained a judgment against a derelict nursing home operator. *Id* at 592. The nursing home also owed money to the Christensens. In the operator’s absence, the Christensens paid \$40,000 out of pocket to run the nursing home during January 1988 for which the state paid \$24,000 to the facility. *Id.* at 593. The lender attached the January money to satisfy his judgment, and the Christensens contested. *Id.*

The court held that the Christensens had an equitable right to the funds because they had operated the facility during January. *Id.* Rather than releasing the attached funds to Chinchurreta, the district judge set up a constructive trust, recognizing legal title to the funds in the nursing home operator, but granting an equitable title to the Christensens. *Id.* The court

held that Chinchurreta had no claim to the funds except through the nursing home operator, who, in turn, had no claim to the funds because he had performed none of the services and made none of the expenditures that led to the \$24,000 payment from the state. *Id.* at 594. The appellate court summarized “The services for which the money has been disbursed were performed by the Christensens. The district court determined that releasing the January money to Chinchurreta rather than to them would create an unjust enrichment. The constructive trust was imposed upon the funds in order to prevent this result. We find no error.” *Id.*

Just as the Christensen’s paid for the nursing home operations for January 1988, MRS incurred out of pocket costs for filing fees, service fees, sheriff’s fees and legal fees to secure the garnishment. Just as the payment from the state came only due to the Christensen’s expenditures, there would have been no garnishment here without MRS’ expenditures. Just as the court created a constructive trust in favor of the Christensens, this Court should create a constructive trust here in favor of MRS. But for MRS’ effort, there would have been no disbursement. Therefore, BB&C received a benefit from MRS and is unjustly enriched by retaining the wages, and a constructive trust should be created in favor of MRS. Until BB&C pays for the value of the benefit, it has been unjustly enriched to MRS’ detriment.

B. BB&C’S Violation Of Idaho Code Section 18-2403 Compels The Conclusion That BB&C Has Been Unjustly Enriched.

In relevant part, Idaho Code Section 18-2403 states:

(1) A person steals property and commits theft when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

(2) Theft includes a wrongful taking, obtaining or withholding of another’s property, with the intent prescribed in subsection (1) of this section, committed in any of the following ways:

(a) By deception obtains or exerts control over property of the owner;

(b) By conduct heretofore defined or know as larceny; common law larceny by trick; embezzlement; extortion; obtaining property, money or labor under false presentences; or receiving stolen goods;

(c) By acquiring lost property. A person acquires lost property when he exercises control over property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or the nature or amount of the property, without taking reasonable measures to return such property to the owner; or a person commits theft of lost or mislaid property when he:

1. Knows **or learns the identity of the owner** or knows, or is aware of, or learns of a reasonable method of identifying the owner; and
2. Fails to take reasonable measures to restore the property to the owner; and
3. Intends to deprive the owner permanently of the use or benefit of the property.

Idaho Code § 18-2403 (emphasis added.)

Idaho Code § 18-2402(6) defines owner as “any person who has a right to possession thereof superior to that of the taker, obtainer or withholder.” Idaho Code §§ 18-2407 and 18-2408 make theft of property with a value in excess of one thousand dollars (\$1,000) felony grand theft. In discussing §18-2403, one Idaho court has explained the following:

It is well established at common law that one who finds and appropriates lost property acquires a complete right thereto against all the world **except the true owner**. *Morgan and Bros. Manhattan Storage Co. v. McGuire*, 114 Misc.2d 951, 452 N.Y.S.2d 986 (1982); *Campbell v. Cochran*, 416 A.2d 211, 221 (Del.1980); *Paset v. Old Orchard Bank & Trust Co.*, 62 Ill.App.3d 534, 19 Ill.Dec. 389, 378 N.E.2d 1264 (1978). See also 36A C.J.S. *Finding Lost Goods* § 5 (1961); 1 Am.Jur.2d, *Abandoned, Lost and Unclaimed Property*, § 19 (1962). In general, the character of the thing found does not affect the property rights of the finder. However, **should the finder know or have reasonable means of discovering the true owner, he must do so** or he may be guilty of larceny. See, e.g., 1 Am.Jur. *Abandoned, Lost and Unclaimed Property*, § 28.

* * *

Idaho criminal law embodies this principle, providing that a person may be held criminally liable for theft “when he exercises control over property of another which he knows to have been lost or mislaid ... **without taking reasonable measures to return the property to the owner.**” I.C. § 18-2403(2)(c). (Emphasis added).

State v. Evans, 119 Idaho 383, 386 (Ct. App. 1991.)

Idaho Code makes the obtaining and withholding of another’s property, with a value in

excess of a thousand dollars, grand theft when the property has “been delivered under a mistake as to the identity of the recipient” and the party thereafter “learns the identity of the owner.” Idaho Code § 18-2403 is nearly identical to theft provisions of several other states, which have held that parties who received funds as a result of mistaken delivery are guilty of theft. *See Cora v. State*, 2009 WL 1471732 (Ark. App. 2009).

In *Cora*, a finance company mistakenly sent a payment to a boat dealer in behalf of a purchaser who had already obtained other financing and used that other financing to pay for the boat. The boat dealer did not know of the overpayment and used the mistakenly sent funds to pay expenses learning only later that it had received the mistaken payment. When the boat dealer could not repay the amount it had mistakenly received, the state charged and convicted the boat dealer of theft under a statute nearly identical to Idaho Code § 18-2403(c).

Here, the same result follows. Stacie Christ’s employer mistakenly sent the garnishment checks to “Bonneville Billing and Collections” instead of “Bonneville County Sheriff.” MRS is an “owner” because MRS’ rights to the mistakenly delivered money are superior to BB&C who merely possesses the mistakenly delivered funds. *See* Idaho Code § 18-2402(6) (which defines owner as “any person who has a right to possession thereof superior to that of the taker, obtainer or withholder”).

As soon as BB&C learned the identity of MRS as the owner of the funds, exercised dominion and control over the funds, and refused to return the funds, BB&C committed felony grand theft under Idaho Code § 18-2403. This wrongful act amounts to grand theft under Idaho law. *See* Idaho Code §§ 18-2407 and 18-2408. Even if the Bonneville County Sheriff or WSEC were the true owner and not MRS, the conduct amounting to grand theft against the Bonneville

County Sheriff, WSEC or MRS necessarily makes that conduct at least unjust enrichment, if not conversion.

The Magistrate Court ignored the plain language of Section 18-2403(c).⁴⁵ Instead, the Magistrate Court relied on *State v. Culbreth*, *supra*, 146 Idaho at 322, for the proposition that BB&C would have to employ “deception, trick, extortion, false pretenses or false promise” for Section 18-2403 to apply. However, the court in *Culbreth* applied its analysis to subparts (a), (b) and (d) of Section 18-2403. The court’s discussion in *Culbreth* never addressed subpart (c) of Section 18-2403. This is important because MRS claims that subpart (c) of Section 18-2403 is the subsection that applies here because this subpart addresses BB&C’s exercising control over property which it knew to have been delivered under a mistake as to the identity of the recipient. In other words, there are multiple subparts to Section 18-2403. The Magistrate Court never addressed the applicability of Section 18-2403(c) to the facts of this case.

VIII. MRS IS ENTITLED TO A CONSTRUCTIVE TRUST IN WHICH BB&C HOLDS THE GARNISHED WAGES IN TRUST FOR MRS.

Constructive trusts are raised by equity for the purpose of working out right and justice, where the parties do not intend to create such a relation, and often directly contrary to the intention of the one holding the legal title. *Hanger v. Hess*, 49 Idaho 325, 288 P. 160 (1930). “If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of

⁴⁵ See Order On Motion To Reconsider, dated June 29, 2010, p.2.

the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.” *Id.*

Constructive trusts “are obligations created by law when money or property has been placed in one person's possession, under such circumstances that in equity and good conscience, he ought not to retain it.” *Warm Springs Properties, Inc. v. Andora Villa, Inc.*, 96 Idaho 270, 526 P. 2d 1106 (1974) (Citing *Hixon v. Allphin*, 76 Idaho 327, 281 P.2d 1042 (1955)). “Where a person receives a benefit from another he is liable to pay therefor if the circumstances of its receipt or retention are such that as between the two it is unjust for him to retain it.” *Id.*

“A constructive trust is a remedial device created primarily to prevent unjust enrichment; equity compels the restoration to another of property to which the holder thereof is not justly entitled... A constructive trust may be imposed in practically any case where there is a wrongful acquisition ***or detention of property to which another is entitled.***” *Chinchurreta v. Evergreen Management, Inc.*, 117 Idaho 591, 790 P.2d 372 (Ct. App. 1989) (Citing *Taylor v. Polackwich*, 145 Cal.App.3d 1014, 194 Cal.Rptr. 8, 13 (2nd Dist.1983)) (emphasis added).

In *Chinchurreta* the court held that a constructive trust existed where the result of enforcement of the attachment would be unjust enrichment. *Chinchurreta v. Evergreen*, 117 Idaho 591. The court held that a trust existed such that the nursing home operator had legal title and the Christensens had equitable title. *Id.* at 594. Because BB&C is unjustly enriched in retaining the garnished wages, the court should hold that MRS holds equitable title to the wages.

IX. THE MAGISTRATE COURT SHOULD HAVE ALLOWED MRS TO AMEND ITS COMPLAINT AS REQUESTED.

A. Standard Of Review.

I.R.C.P. 15(a) provides that “a party may amend his pleading only by leave of court ... and leave shall be freely given when justice so requires....” The grant or denial of leave to amend after a responsive pleading has been filed is a matter that is within the discretion of the trial court and is subject to reversal on appeal only for an abuse of that discretion. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat. Bank, N.A.*, 119 Idaho 171, 175, 804 P.2d 900 (1991).

The court may consider whether the new claims the amended complaint proposes to insert into the action state a valid claim. If the amended pleading does not set out a valid claim or if the delay would prejudice the opposing party by the delay in adding the new claim, it is not an abuse of discretion for the trial court to deny the motion to file the amended complaint. *Id.* (citing *Bissett v. State*, 111 Idaho 865, 869, 727 P.2d 1293, 1296 (Ct.App.1986)). Conversely, if the amended pleading does set out a valid claim and the opposing party would not be prejudiced by the delay, it is an abuse of discretion to deny the motion to file the amended complaint.

B. The Magistrate Court Abused Its Discretion When It Denied MRS’ Motion To File An Amended Complaint.

MRS filed the Motion to File An Amended Complaint on the grounds and for the reasons that (1) the defendant’s motion for summary judgment was filed after minimal discovery, before discovery was closed, before a trial date was set and therefore was more akin to a motion for judgment on the pleadings which courts generally grant with leave to amend; and (2) MRS sought to file an amended complaint to raise claims for Claim and Delivery under Idaho Code Section 8-

301, *et seq.* (Common Law Replevin and Detinue), Lien Foreclosure, and Intentional Interference With A Prospective Economic Advantage after this Court's February 16, 2011 order stated for the first time that MRS has a lien on the proceeds BB&C was holding.⁴⁶

Idaho Rule of Civil Procedure 15(a) states, in pertinent part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty (20) days after it is served. ***Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.*** . . . (Emphasis added).

The Idaho Supreme Court has stated that "A court should liberally grant a motion to amend a complaint." *Iron Eagle Development, LLC v. Quality Design Systems*, 138 Idaho 487, 492 (2003)(citing *Hayward v. Valley Vista Care Corp.*, 136 Idaho 342 (2001)). "The purpose behind allowing a party to amend its complaint is so all claims will be decided on their merits and to provide notice of the claim and the facts at issue." *Id.*(citing *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866 (1999)).

The Idaho Supreme Court, relying on language from the United States Supreme Court, has said:

If the ***underlying facts or circumstances*** relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, be "freely given."

Smith v. Great Basis Grain Co., 98 Idaho 266, 273 (1977)(citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962)) (emphasis added).

⁴⁶ See February 16, 2011 Order On Reconsideration, p.3.

The policy behind allowing a plaintiff to amend his complaint is so strong that the Idaho Supreme Court has reversed a trial court for failing to allow a plaintiff to amend his complaint where the plaintiff made a motion to file an amended complaint after the court had granted summary judgment in favor of the defendant. *Sinclair Marketing, Inc. v. Siepert*, 107 Idaho 1000 (1985). However, a plaintiff must file a motion to amend his complaint after entry of summary judgment to qualify for Rule 15(a)'s liberal application. *Walker v. Idaho Board of Highway Directors*, 96 Idaho 41 (1974). See also *Maharishi Hardy Blechman LTD v. Abercrombie & Fitch Company*, 292 F.Supp.2d 535, 554-555 (2003) (holding that "the Court has discretion to grant a party leave to amend its complaint even after that complaint is dismissed on summary judgment" and affirming such action where (1) discovery was relatively modest; (2) a complaint more limited in scope may raise a triable issue; and (3) the defendant's challenge was more like a motion to dismiss for failure to state a claim or for judgment on the pleadings that courts routinely grant leave to amend unless it determines that any amendment would be futile).

In *Smith v. Great Basis Grain Co.*, 98 Idaho 266 (1977), the trial court granted summary judgment to all defendants and further granted leave to the plaintiffs to amend their complaints. One of the defendants moved to dismiss the amended complaint because the amended complaint stated a new cause of action against it. In affirming the district court's allowing the plaintiff to amend its complaint, the Idaho Supreme Court stated that "The changes in the amended complaints do reflect a new legal theory of recovery against defendant Millers. There is no problem with this, however, ***since the basic facts giving rise to a right of recovery remain unaltered.*** The mandate of I.R.C.P. 15(a) is that leave to amend "shall be freely given when justice so requires." *Id.* at 272 (emphasis added). The Idaho Supreme Court

concluded that the trial court properly exercised its discretion in allowing the plaintiff to file an amended complaint and affirmed the trial court's decision on appeal.

Here, the Magistrate Court should have exercised its discretion in favor of allowing MRS to file an amended complaint. The proposed amended complaint reflected new legal theories of recovery based on the same set of undisputed facts already submitted to the court. Therefore, no new discovery was really needed; but even if it were, discovery had not been closed. In fact, this case had not even been set for trial.

Moreover, MRS (not the defendant) initially moved for summary judgment to test its own pleadings. The defendant moved for summary judgment in response to MRS having moved for summary judgment. The early procedural challenge is important because it makes the challenge to the pleadings akin to a motion to dismiss or a motion for judgment on the pleadings, which courts usually grant with leave to amend. Another important factor is that the Magistrate Court raised the issue that MRS has a lien and not ownership of the garnished wages. The defendant never raised this as an issue in the case. MRS should have been given the opportunity to file an amended complaint to address that issue which the Magistrate Court raised for the first time in the case.

Finally, given that only modest discovery was necessary to develop the undisputed record and that the pleadings were tested very early in this case even before any trial date was set or discovery closed, the defendant could not establish any prejudice.

C. The Court Wrongly Found That There Was Bad Faith Or Dilatory Motive When It Denied MRS' Motion To File An Amended Complaint.

In its Order On Motion For Reconsideration And Motion To File An Amended Complaint dated April 29, 2011, the Court wrongly held that MRS filed its proposed amended complaint

“for the sake of delaying the consequences of the prior orders herein.”⁴⁷ The court wrongly speculates without citing any evidence to support this finding. In its February 16, 2011 Order On Reconsideration, the court essentially ruled that MRS is not an owner of the property and therefore, could not recover on any proposed theory. The court also ruled that MRS merely had a lien and wrongly cited *Chavez* to state that a lien grants no interest in property.

The first substantive ruling holding that MRS has a lien, but also holding that a lien grants no rights, led MRS to consider new applicable theories. MRS sought not to delay, but to enforce the court identified lien right. This led MRS to discover that it had a cause of action under a claim and delivery theory.

The Magistrate Court erred in holding that MRS had dilatory motive or exercised bad faith because there were new, viable theories of the case based on the only substantive ruling the Magistrate Court ever made. No evidence exists in the record to support this “bad faith” finding.

X. THIS COURT SHOULD ORDER BB&C TO RETURN THE MONEY IT HAS GARNISHED.

An appellate court has authority to order a losing party on appeal to immediately return all the money that party recovered on the judgment the appellate court reverses. *BECO Const. Co., Inc. v. J-U-B Engineers, Inc.*, 149 Idaho 294 (2010). Here, MRS fully expects that this Court will reverse the decision of the Magistrate Court and remand this matter accordingly. As part of the remand, this Court should order that BB&C immediately pay to MRS all money that BB&C garnished from MRS in full satisfaction of the judgment the Magistrate Court wrongfully entered

⁴⁷ See Order On Motion For Reconsideration And Motion To File An Amended Complaint, April 29, 2011. p. 4.

against MRS. In this regard, BB&C garnished MRS and has received payment in full on the judgment.

XI. MRS IS ENTITLED TO RECOVER ATTORNEY'S FEES AND COSTS ON APPEAL.

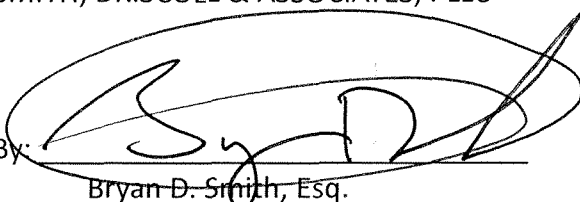
As the prevailing party on appeal, MRS is entitled to an award of attorney's fees under § 12-120(1) because the amount pleaded is less than \$25,000. *Loftus v. Snake River School District*, 130 Idaho 426 (1997). Moreover, MRS is entitled to an award of costs under I.A.R. 40. Accordingly, MRS requests that the court award it attorney's fees and costs.

XII. CONCLUSION.

For all the reasons set forth above, MRS respectfully requests that (1) the court reverse the judgment of the Magistrate Court against MRS; (2) vacate the order granting BB&C's motion for summary judgment; (3) direct that the Magistrate Court grant MRS' motion for summary judgment; (4) order BB&C to immediately repay all amounts it garnished MRS for; and (4) award MRS attorney's fees and costs on appeal.

DATED this 11th day of July, 2011.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 
Bryan D. Smith, Esq.
Attorneys for Plaintiff
Medical Recovery Services, LLC

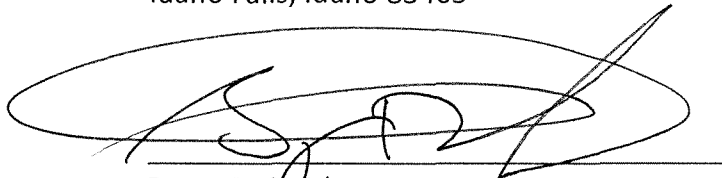
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of July, 2011, I caused a true and correct copy of the forgoing **APPELLATE BRIEF** to be served, by placing the same in a sealed envelope and depositing it in the U.S. Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

PARTIES SERVED:

- ☒ U.S. Mail
- ☐ Facsimile Transmission
- ☐ Overnight Delivery
- ☐ Hand Delivery
- ☐ Courthouse Mail Box

Todd R. Erikson, Esq.
3456 East 17th Street, Suite 280
Idaho Falls, Idaho 83405


Bryan D. Smith

Todd R. Erikson, #4374
Todd R. Erikson, P.A.
3456 E. 17th St., Ste. 280
Idaho Falls, ID 83406
Telephone: (208) 522-3305

BONNEVILLE COUNTY
IDAHO
2011 AUG -8 PM 2:51

Attorney for Defendant/Respondent

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

| | | |
|----------------------------|---|---------------------|
| MEDICAL RECOVERY SERVICES, |) | Case No. CV 08-5817 |
| PLLC, |) | |
| |) | |
| Plaintiff/Appellant, |) | RESPONDENT'S BRIEF |
| vs. |) | |
| |) | |
| BONNEVILLE BILLING AND |) | |
| COLLECTIONS, INC., |) | |
| |) | |
| Defendant/Respondent. |) | |
| |) | |

I. FACTUAL AND PROCEDURAL HISTORY.

A. FACTS.

In April 2008 Medical Recovery Services (MRS) filed a complaint against Stacie Christ ("Christ"), obtained a judgment in June 2008 for \$1,868.15, and then garnished Christ's wages at Western States Equipment Company ("WSEC"). WSEC garnished Christ's wages, and on July 10, July 24 and August 7, 2008, WSEC sent WSEC checks by mistake to Bonneville Billing and Collections, Inc. ("BBC") totaling \$1,0831.21.

BBC had also filed a complaint against Christ in May 2008, for \$325.50 principal, \$15.61 interest, \$300.00 attorney fees, \$66.00 filing fee, and the service fee cost. BBC had also sent a demand letter to Christ for another account on July 30, 2008, in the amount of \$966.86.

BBC applied the WSEC checks to its complaint against Christ and the accounts BBC was pursuing against Christ. BBC knew that WSEC was the employer of Christ. BBC believed that the WSEC checks it received from WSEC for Christ were from a voluntary wage assignment.

On August 27, 2008, BBC dismissed its case against Christ and did not assess any attorney fees to the settlement of the case thus benefitting Christ \$300.00.

On October 9, 2008, BBC filed suit against Christ in Bonneville County Case No. 08-6263, praying for \$552.22 principal, \$78.25 interest and attorney fees of \$350.00. On December 11, 2008, BBC obtained a judgment for \$1,065.47 in Case No. CV 08-6263. This judgment was subsequently satisfied by a continuing wage garnishment from Christ's wages from WSEC.

On August 20, 2008, Clayne Bodily, BBC's manager, spoke with WSEC which indicated that WSEC had mistakenly sent WSEC checks to BBC for Christ, but that WSEC would now send the checks to the Bonneville County Sheriff. Bodily asked if BBC could keep the WSEC checks it had already deposited and applied to Christ's accounts with BBC, and if WSEC could just continue the MRS garnishment. WSEC did not contact BBC again regarding this request. Bodily was later informed by WSEC that they had been instructed by MRS's attorney Bryan D. Smith not to speak with BBC.

BBC did not return the checks to WSEC as demanded by MRS because BBC had accounts of Christ assigned to it for collection and Christ did, in fact, owe on those accounts. WSEC never demanded the return of the checks. The amounts owed by Christ were greater than the amounts which BBC received from WSEC. If BBC would not have had any accounts of Christ assigned to it for collection at the time it received the checks from WSEC, then it would not have kept the checks,

but would have returned them to WSEC as there would have been no moneys owing from Christ to BBC.

There was a continuing garnishment of Christ's wages from at least July 2008 through at least April 2009 and Christ continued to be employed at WSEC during that entire time. MRS discontinued the garnishment against Christ and, in fact, instructed WSEC to stop payment on a check or to recall a check from the Bonneville County Sheriff from WSEC which had continued to garnish the wages of Christ. WSEC was obligated to continue the garnishment and was continuing the garnishment until ordered to discontinue the garnishment by MRS. If MRS had continued its garnishment rather than discontinuing it in order to pursue this litigation, then MRS would have received the equivalent amount from WSEC that BBC received from WSEC by October 2008 and this matter would be moot.

On August 21, 2008, MRS sent a letter to BBC demanding BBC return the \$1,083.21 to WSEC and threatening a lawsuit. BBC responded by letter and refused to return the \$1,083.21.

B. PROCEDURE.

On September 18, 2008, MRS filed suit against BBC for conversion, unjust enrichment and constructive trust. MRS moved for summary judgment on March 19, 2009. On June 4, 2009, the magistrate court denied MRS's motion for summary judgment concluding that BBC had not "converted" MRS's property nor had it been "unjustly enriched." The magistrate court concluded that the MRS's claim against BBC was not sustainable. MRS then appealed that decision which the district court dismissed as not appealable. MRS then filed its first motion for reconsideration. On July 7, 2010, the magistrate court (Judge Linda Cook) denied MRS's motion.

On August 24, 2010, the magistrate court (Judge Linda Cook) granted BBC's motion for summary judgment finding that MRS's complaint failed to state a cause of action against BBC as a matter of law, awarded judgment against MRS, dismissed with prejudice MRS's complaint and awarded BBC attorney fees and costs. On September 3, 2010, BBC filed its memorandum of costs and attorney fees. MRS failed to timely file an objection to the memorandum of costs and fees. On November 17, 2010, judgment was entered against MRS for attorney fees and costs in the amount of \$10,658.

On December 2, 2010, MRS filed its second motion for reconsideration. Again, the magistrate court (Judge Steven A. Gardner) denied the motion. Again, MRS filed another motion for reconsideration, its third such motion. After nearly two years from filing its complaint MRS also filed a new motion to amend the complaint and add causes of action for claim and delivery, lien foreclosure and intentional interference with a prospective economic advantage. For the third time the magistrate court (Judge Steven A. Gardner) on April 29, 2011, again denied the motion to reconsider, and also denied the motion to amend the complaint. On May 3, 2011, MRS appealed.

II. STANDARD OF REVIEW.

"Where an order of a lower court is correct, albeit based on a different theory than that found to be dispositive by this Court, the lower court order will be affirmed. *Southern Idaho Realty v. Hellhake and Associates, Inc.*, 102 Idaho 613, 636 P.2d 168 (1981); *Matter of Revello*, 100 Idaho 829, 606 P.2d 933 (1979); *Robison v. Compton*, 97 Idaho 615, 549 P.2d 274 (1976); *City of Weippe v. Yarno*, 96 Idaho 319, 528 P.2d 201 (1974)." *Sheppard v. Sheppard*, 104 Idaho 1, 7 (Idaho 1982). "This [C]ourt must uphold the finding and judgment of the trial court if it is capable of being upheld on any theory." *Fischer v. Fischer*, 92 Idaho 379, 382, 443 P.2d 463, 466 (1968)." *Mortensen v.*

Stewart Title Guar. Co., 149 Idaho 437, 235 P.3d 387, 396 (Idaho 2010). "This Court may uphold decisions on alternate grounds from those stated in the findings of fact and conclusions of law on appeal. See *Hanf v. Syringa Realty Co., Inc.*, 120 Idaho 364, 370, 816 P.2d 320, 326 (1991) (citing *Foremost Ins. Co. v. Putzier*, 102 Idaho 138, 627 P.2d 317 (1981) and *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 100 Idaho 175, 179, 595 P.2d 709, 713 (1979))." *Martel v. Bulotti*, 138 Idaho 451, 454 (Idaho 2003)

"Error will not be presumed on appeal but must be affirmatively shown on the record by appellant." *Triad Leasing & Financial, Inc. v. Rocky Mountain Rogues, Inc.*, 148 Idaho 503, 224 P.3d 1092, 1100 (Idaho 2009). "As the appealing party, [the appellant] carries the burden of showing that the district court committed error. See *Western Cmty. Ins. Co. v. Kickers, Inc.*, 137 Idaho 305, 306, 48 P.3d 634, 635 (2002)." *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 95 P.3d 977, 983 (Idaho 2004).

III. ARGUMENT.

A. THE IDAHO GARNISHMENT STATUTES GOVERN.

"When interpreting a statute, this Court must strive to give force and effect to the legislature's intent in passing the statute. *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 336 (1994). It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." *McLean v. Maverick Country Stores, Inc.*, 142 Idaho 810, 813 (2006) (citations omitted). "Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction." *State v. Rhode*, 133 Idaho 459, 462 (1999)." *Wheeler v. Idaho Department of Health and Welfare*, 2009 ID 0409.181, page 7. "We interpret statutes according to the plain,

express meaning of a provision in question, and we will resort to judicial construction only if the provision is ambiguous, incomplete, absurd, or arguably in conflict with other laws.” *Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732, 742 (1999). “The Court interprets statutes according to their plain, express meaning, but will resort to judicial construction when the statute is “ambiguous, incomplete, absurd, or arguably in conflict with other laws.” *Ada County Highway Dist. v. Total Success Investments, LLC*, 145 Idaho 360, 179 P.3d 323, 329 (Idaho 2008). “If the statutory language is unambiguous, we merely apply the statute as written.” *Sumpter v. Holland Realty, Inc.*, 140 Idaho 349, 93 P.3d 680, 682 (Idaho 2004).

The following unambiguous Idaho statutes deal with garnishments and control in this matter:

All persons having in their possession or under their control, any credits or other personal property belonging to the defendant, at the time of service upon them of a copy of the writ and notice, as provided in the last two (2) sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged or any judgment recovered by him be satisfied.

Idaho Code Section 8-508 (emphasis added).

When the garnishee is the employer of the judgment debtor, the judgment creditor, upon application to the court, shall have issued by the clerk of court, a continuing garnishment directing the employer-garnishee to pay to the sheriff such future moneys coming due to the judgment debtor as may come due to said judgment debtor as a result of the judgment debtor’s employment. This continuing garnishment shall continue in force and effect until the judgment is satisfied. The creditor shall be solely responsible for insuring that the amounts garnished do not exceed the amount due on the judgment. If additional garnishments are issued during the term of a continuing garnishment and the continuing garnishment is the maximum allowed under the provisions of section 11-207, Idaho Code, the additional garnishments cannot be served until the continuing garnishment is satisfied, or until the amount taken by the continuing garnishment is less than the maximum allowed; additional garnishments issued during the term of a continuing garnishment must be served in the order in which presented.

Idaho Code Section 8-509(b)(emphasis added).

Any person who has been served with a copy of the writ and notice as provided in sections 8-506--8-508, 11-201, 16-603, 16-604, or 16-1104, shall be deemed a garnishee, and service of copy of writ and the notice therein provided for, shall, for the purpose of sections 8-510--8-523, be deemed to be notice of garnishment, and whenever any person shall have been served with notice of garnishment as herein defined, he may discharge himself by paying or delivering to the officer all debts owing by him to the defendant, or a portion thereof sufficient to discharge the claim of the plaintiff, or any or all money of the defendant in his hands to a similar amount, taking a receipt therefor from the officer, which shall discharge such person from any and all liability to the extent of such payment, and which shall be held by the officer subject to the orders of the court out of which the writ issued.

Idaho Code Section 8-510 (emphasis added).

If the garnishee admits in his answer that he is indebted to the defendant, or has money or property of the defendant in his hands, or under his control, and fails or refuses to turn the same over to the officer as in section 8-510 is provided, the plaintiff may move the court out of which the writ issued, on or before the return day thereof, for judgment against the garnishee for the amount of such admitted debt, or for the delivery to the officer of the money or property of the defendant in his hands, to an amount sufficient to satisfy the plaintiff's claim; serving the garnishee with due notice of the said motion; and at the hearing thereof the court shall render such judgment as shall be conformable to law and the facts shown to exist.

Idaho Code Section 8-516 (emphasis added).

**B. MRS HAS NO PROPERTY RIGHTS IN WSEC CHECKS WRITTEN TO BBC
BY THE GARNISHEE WSEC AND NOT IN THE POSSESSION OF WSEC.**

“The remedy by attachment is entirely statutory, and the requirements of the statute must be substantially followed; otherwise, the attaching creditor acquires no superior right or lien upon the debtor's property.” *American Fruit Growers, Inc. v. Walmstad*, 44 Idaho 786, 792 (1927). “The right of attachment by garnishment was unknown to the common law, and is purely of statutory regulation, and where the statute provides for the procedure in such cases, the plaintiff is only required to pursue such course in order to sustain his action against the garnishee.” *Eagleson v. Rubin*, 16 Idaho 92, 100 (1909).

Eagleson v. Rubin provides that the “right of attachment by garnishment was unknown to the

common law, and is purely of statutory regulation, and where the statute provides for the procedure in such cases, the plaintiff is only required to pursue such course in order to sustain his action against the garnishee.” *Id.* at 100. Additionally, *Eagleson* provides the following regarding garnishees: "Garnishment is the admonition judicially given to the attachment defendant's debtor or holder of property, warning him against payment or restoration to the defendant, and bidding him hold the property or credit subject to the order of court. It is the process by which the garnishee is brought into court, and also that by which the defendant's credit or property is attached in the garnishee's hands. Its service is constructive seizure by notice. It is attachment in the hands of a third person." *Id.*(emphasis added).

“With reference to the execution of the writ of attachment C. S., sec. 6784, provides that personal property capable of manual delivery must be attached by taking it into custody. In case of tangible property, susceptible of manual seizure and delivery, such property must be actually seized and taken into possession by the levying officer, and that officer must take and maintain actual custody and control of the property by such means as will exclude others from such custody.” *Id.* at 793.

The cases cited by MRS do not support its position that it has any rights in WSEC checks written from a WSEC account to BBC and not WSEC's (the garnishee's) possession. MRS cites *Potlatch Lumber Co. v. Runkel*, 16 Idaho 192 (1909) for the proposition that an attachment, duly and regularly issued and levied, becomes a lien on the property. *Potlatch Lumber Co. v. Runkel* involved an intervener action regarding real property. *Potlatch* also involved a former statute of Idaho, sec. 4302, Rev. Codes. Real property is not a fact of the instant case.

In *Federal Reserve Bank of San Francisco v. Smith*, 42 Idaho 224 (1926), the plaintiff obtained a lien upon the pledged property in the hands of the pledgee bank by virtue of the garnishment proceedings. The case says nothing of any property right against a third party who is not a garnishee and not subject to the garnishment. The case dealt with the sheriff having in his possession the property, not a third party. The case indicates that all controversies between the plaintiff and the garnishee as to ownership of the property are for decision by the court in which the writ issued. *Id.* at 229.

Additionally, *In re Aughenbaugh*, 2002 WL 33939738 (Bankr. D. Idaho 2002), dealt with the property in the hands of the garnishee not a third party. The case provided that service of the writ of garnishment created a lien but did not constitute an irrevocable or absolute transfer of the debtor's rights in the proceeds or property. The case provided that with respect to a debtor's creditors, funds in the hands of a third party not subject to the claim of the debtor are not subject to attachment.

A garnishment is "the process by which the garnishee is brought into court, and also that by which the defendant's credit or property is attached in the garnishee's hands. Its service is constructive seizure by notice. It is attachment in the hands of a third person." *Eagleon v. Rubin*, 16 Idaho 92, 100 P. 765, 767 (1909) (quoting Waples, Attachment and Garnishment, § 469). Inland is correct in its assertion that service of the writ of garnishment created a lien on the property held in the hands of the garnishee--here, the Sheriff's Department. " 'By the service in the manner provided by statute, whether it be termed 'garnishment' or 'service of the attachment,' while the possession is not necessarily disturbed, 'a lien is obtained on defendant's title to the property in the hands of the garnishee.' " " *Sullivan v. Mabey*, 45 Idaho 595, 264 P. 233, 236 (1928) (quoting *Kimball v. Richardson-Kimball Co.*, 111 Cal. 386, 43 P. 1111 (1896)). "The plaintiff in the attachment action obtained a lien upon the pledged property in the hands of the pledgee bank by virtue of the garnishment proceedings." *Fed. Res. Bank of San Francisco v. Smith*, 42 Idaho 224, 244 P. 1102, 1103 (1926). See also *Trustee, Ltd. v. Bowen-Hall, Inc. (In re Pro-Ida Foods, Inc.)*, 88 I.B.C.R. 219, 221-22 (Bankr.D.Idaho 1988) (noting that garnishment creates a lien for the purpose of an avoidable preference action under 11 U.S.C. § 547).

This does not mean that Inland is entitled to the relief which it seeks. Inland wishes, in effect, to foreclose its lien by garnishing Mr. Ducommun's wages. However, all of the Idaho authorities for the proposition that garnishment creates a lien limit that lien to property

actually held by the garnishee. E.g., Sullivan, supra, 264 P. at 236 (" '[A] lien is obtained on defendant's title to the property in the hands of the garnishee' ") (emphasis added). Possession by the garnishee is, therefore, a necessary element for existence of the garnishment lien.

This accords with other Idaho law. Garnishment is, as Eagleson noted, "attachment in the hands of a third person." 100 P. at 767. In the case of *American Fruit Growers, Inc. v. Walmstad*, 44 Idaho 786, 260 P. 168 (1927), a sheriff served a writ of attachment against certain property and issued a proper return, but apparently failed to take possession of the property as the return indicated. Because the attachment statute required the sheriff to take personal possession of the property, the Supreme Court of Idaho held that the attachment failed.

..... the lien thereof was absolutely lost when the [employer] or his keeper permitted appellant to take and retain possession of the property. Even the return of the [employer] does not purport to indicate that he continued in possession, and the evidence is entirely uncontradicted that at least from September 1st to the date of sale this property was out of the control of the officer, and was in no sense in custodia legis. The lien of the attaching creditor, if any he ever had, was dependent upon the continuation of possession by the [employer]. The lien that [creditor] had by virtue of the garnishment was over a portion of those wages that [debtor] earned in May, 1993. Those funds are no longer in the possession of the [employer], the garnishee. There is, therefore, no lien against those funds.

In re Loren v. Ducommun, 159 B.R. 919, 920-921 (Bkrcty. D. Idaho 1993)(emphasis added).

In this matter the sheriff never obtained possession of the WSEC checks in question from WSEC. The garnishee, WSEC, made payments directly to BBC not to the sheriff. WSEC made payments on its own banking account to BBC. The MRS's garnishment remains in force and effect until the judgment is satisfied. WSEC, as the garnishee, remains liable for the judgment. WSEC could discharge its liability by paying to the sheriff the amount of the debt. WSEC attempted to comply with the statute by continuing the garnishment, but MRS stopped the garnishment and returned garnished funds back to the sheriff.

MRS has no rights in checks written to BBC by the garnishee, WSEC, on WSEC's own bank account. MRS has no lien in WSEC checks which are not in the possession of WSEC but in the possession of BBC. MRS's claim, if any, is against WSEC as the garnishee. WSEC, as the

garnishee, remains liable to MRS until the garnishment is satisfied pursuant to Idaho statute. This is the plain meaning and intent of the garnishment statutes.

C. BBC HAS NOT CONVERTED ANY PROPERTY OF MRS.

"Conversion" has been defined as "a distinct act of dominion wrongfully asserted over another's personal property in denial [of] or inconsistent with [the] rights therein." *Torix v. Allred*, 100 Idaho 905, 910 (1980). "A complaint which alleges that plaintiff is the owner and entitled to the possession of property therein described and that defendant converted it to his own use, and which states the value of the property, or alleges that plaintiff has been damaged in a sum named, sufficiently states a cause of action for conversion, unless other averments are required by statute. *See Williams v. Bone*, 74 Idaho 185, 187-88 (1953)." *Id.*

BBC had valid, legal accounts assigned to it for which it was pursuing collection against Christ when WSEC sent WSEC checks to BBC. The amount of the accounts assigned to BBC exceeded the amount of the checks it received from WSEC. The checks were written on WSEC's account. BBC has never had in its possession any property of MRS. BBC acted reasonably and in good faith in retaining the checks of WSEC and applying them to the accounts of Christ. BBC had no duty to inquire as to the WSEC checks. BBC had no notice of any UCC filing creating any priority or lien. There is simply no conversion of MRS property by BBC.

D. BBC HAS NOT BEEN UNJUSTLY ENRICHED BY MRS.

A prima facie case of unjust enrichment consists of three elements: (1) there was a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the Defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof. *Vanderford Co., Inc. v.*

Knudson, 165 P.3d 261, 272 (2007)(emphasis added). Unjust enrichment is an equitable claim and "[e]quitable claims will not be considered when an adequate legal remedy is available." *Iron Eagle Development, L.L.C. v. Quality Design Systems, Inc.*, 138 Idaho 487, 492 (2003).

In this matter MRS did not confer any benefit upon BBC. If receipt of WSEC checks is the alleged benefit conferred upon BBC, then it is WSEC which conferred the benefit and not MRS. MRS has never claimed that it directed WSEC to write checks to BBC. There simply was no benefit conferred upon BBC by MRS.

It is not inequitable for BBC to have accepted the benefit from WSEC as BBC had accounts for which Christ owed. It is not inequitable for BBC to retain the checks received from WSEC as MRS would have still received payment from WSEC under the continuing garnishment which would have satisfied the judgment. However, rather than continuing to accept checks from the sheriff MRS voluntarily discontinued the continuing garnishment which would have satisfied MRS's judgment against Christ. Furthermore, MRS has an adequate legal remedy against WSEC pursuant to Idaho garnishment statutes. BBC simply has not been unjustly enriched by MRS.

E. MRS HAS NO CONSTRUCTIVE TRUST.

A constructive trust is a "remedial device created primarily to prevent unjust enrichment . . ." *Chinchurreta v. Evergreen Management, Inc.*, 117 Idaho 591, 790 P.2d 372 (Ct. App. 1989). Since MRS did not confer any benefit upon BBC, there can be no unjust enrichment, and thus there can be no constructive trust. Furthermore, there is no need for an equitable remedy when a legal remedy is available through the garnishment statutes. *See Iron Eagle Development, L.L.C. v. Quality Design Systems, Inc.*, 138 Idaho 487 (2003).

F. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING MRS'S THREE MOTIONS FOR RECONSIDERATION.

"The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court." *Jordan v. Beeks*, 135 Idaho 586, 21 P.3d 908, 914 (2001). MRS's arguments "do not add anything of substance to the case." Order on Motion for Reconsideration and Motion to File and Amended Complaint, p. 2. The magistrate court has not abused its discretion in reaching the same conclusion five different times that BBC is entitled to summary judgment against MRS.

G. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING MRS'S MOTION TO AMEND THE COMPLAINT.

"A trial court's rulings on a motion in limine, a motion to amend the pleadings to add a claim for punitive damages, and a motion to amend the pleadings pursuant to Rule 15(b) are reviewed for an abuse of discretion. . . . *Hughes v. Fisher*, 142 Idaho 474, 484, 129 P.3d 1223, 1233 (2006) (Rule 15(b))(emphasis added). The Idaho Supreme Court has made it clear that leave to amend is a matter within the trial court's discretion." *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 750, 215 P.3d 457, 470 (2009). "The magistrate's discretionary decisions will be upheld absent a showing that the court abused its discretion. *Quiring v. Quiring*, 130 Idaho 560, 563, 944 P.2d 695, 698 (1997)." *Hunt v. Hunt*, 137 Idaho 18, 43 P.3d 777, 779 (Idaho 2002). A court abuses its discretion if it fails to act consistently with legal standards. *State v. Field*, 144 Idaho 559, 568, 165 P.3d 273, 282 (2007)." *Todd v. Sullivan Const. LLC*, 146 Idaho 118, 191 P.3d 196, 199 (Idaho 2008). "When reviewing a discretionary decision of the trial court this Court determines (1) whether the court perceived the issue as discretionary; (2) whether the court acted within the bounds of that

discretion and applied the correct legal standards; and (3) whether the court reached its decision through an exercise of reason. *Hayward v. Valley Vista Care Corp.*, 136 Idaho 342, 345, 33 P.3d 816, 819 (2001)." *American Pension Services, Inc. v. Cornerstone Home Builders, LLC*, 147 Idaho 638, 213 P.3d 1038, 1041 (Idaho 2009).

MRS filed its complaint in September 2008. MRS has had considerable time for discovery. MRS filed its own motion for summary judgment in March 2009. The magistrate court used its proper discretion to deny the motion to file an amended complaint as untimely. As the magistrate court acutely pointed out MRS's motion to amend complaint was "simply an attempt by MRS to circumvent the effects of the unfavorable summary judgment." Order on Motion for Reconsideration and Motion to File and Amended Complaint, p. 4. The proposed amended complaint was not based upon any newly discovered evidence, but was made for the sake of delaying the consequences of the prior orders. In this case, the magistrate court based its decision on Rule 15(b) and properly exercised its discretion within the bounds of the magistrate court's authority and consistent with legal standards.

H. BBC WAS ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS AS THE PREVAILING PARTY IN THE MAGISTRATE COURT.

As the prevailing party in the matter below under five separate orders all finding for BBC and against MRS, and issued by two different magistrate judges, BBC was entitled to an award of attorney's fees and costs under Idaho Code Section 12-120(1). Furthermore, MRS failed to timely object to the amount of the award of attorney fees and costs to BBC.

I. BBC IS ENTITLED TO RECOVER ATTORNEYS FEES AND COSTS ON APPEAL.

As the prevailing party on appeal, BBC is entitled to an award of attorney's fees pursuant to Idaho Code Section 12-120(1) and I.A.R. 40. Accordingly, BBC requests that the court award it its attorney fees and costs in this matter.


IV. CONCLUSION.

BBC has converted no property of MRS. BBC has not been unjustly enriched by MRS. MRS does not have a claim against BBC upon which relief can be granted. MRS is not the real party in interest. Under the Idaho garnishment statutes MRS's cause of action, if any, is against the garnishee, WSEC. The garnishee, WSEC, remains liable to MRS pursuant to Idaho garnishment statute until the garnishment is paid in full.

Two separate magistrate judges have ruled on five separate occasions regarding the same issues before this court. Each time the magistrate judges have found against MRS and for BBC. The magistrate court has made a "thorough review of all prior proceedings herein, the facts and the law pertaining to this case." Order on Motion for Reconsideration and Motion to File and Amended Complaint, p. 2.

MRS's appeal should be denied, the magistrate court's order granting summary judgment to BBC and the court's three subsequent orders by two different judges denying MRS's repeated motions for reconsideration and its motion to amend complaint should be affirmed, and BBC should be awarded its attorney fees and costs on appeal.

DATED this 8th day of August, 2011.


Todd R. Erikson

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 8th day of August, 2011, by courthouse box:

Bryan N. Zollinger
Bryan D. Smith
Smith, Driscoll & Associates, PLLC
PO Box 50731
Idaho Falls, ID 83405



Bryan D. Smith, Esq.
Idaho State Bar # 4411
Bryan N. Zollinger, Esq.
Idaho State Bar # 8008
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731

BONNEVILLE COUNTY
IDAHO

2011 AUG 29 PM 4: 26

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MEDICAL RECOVERY SERVICES, LLC, an
Idaho limited liability company,

Plaintiff,

vs.

BONNEVILLE BILLING AND COLLECTIONS,
INC, a Utah corporation,

Defendant.

Case No. CV-2008-0005817

REPLY BRIEF

I. BBC'S STATEMENT OF FACTS OMITTS RELEVANT FACTS.

BBC says that it filed a complaint against Christ but omits that it had no judgment which would have entitled BBC to collect on the claim. MRS does not dispute that BBC may have initially reasonably believed that the money it received was from a voluntary wage assignment. However, BBC could not continue this reasonable belief once BBC received MRS' demand letter dated August 21, 2008 in which MRS informed BBC of the mistake regarding ownership and delivery of the funds. After receiving the demand letter, BBC had actual notice that it had received the funds by mistake.

Moreover, BBC points out that it dismissed its complaint against Christ on August 27, 2008 in response to receiving the funds. However, BBC dismissed its complaint six days *after* being notified that MRS had a superior claim to the funds. At this point, BBC could not reasonably rely on receipt of the funds to dismiss its case because BBC knew by then that it had received the funds by mistake.

II. STANDARD OF REVIEW.

As explained in MRS' Opening Brief, "[o]n appeal from the grant of . . . summary judgment, this Court's standard of review is the same as the standard used by the court originally ruling on the motion." *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237 (2007). Summary judgment is warranted only "if the pleadings, depositions, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c).

Here, BBC argues in favor of a standard of review that is not a standard of review at all. Instead, BBC cites law that the court can affirm on grounds other than those forming the basis for a lower court's ruling. Implicit in BBC's argument is that the magistrate court's ruling is incorrect but this Court should affirm anyway on alternative grounds. Thus, BBC appears to concede that the magistrate court's analysis (i.e., MRS has a lien but BBC cannot convert that lien) is incorrect, but there are other reasons this Court should uphold the grant of summary judgment against MRS.¹

¹ BBC's position explains why BBC does not address any of the cases MRS cites establishing that a party can convert a lien and why BBC does not defend the magistrate court's ruling that MRS has a lien which cannot be converted. BBC essentially concedes this point because it knows that if there is a lien, it can be converted. Necessarily, BBC

MRS addresses each of these “alternative grounds” below.

III. ANY REMEDY AGAINST WSEC UNDER THE GARNISHMENT STATUTE IS NOT AN EXCLUSIVE REMEDY AND DOES NOT PROTECT BBC FROM LIABILITY FOR CONVERSION.

BBC’S first “alternative ground” is to argue that MRS should have sued WSEC, not BBC.

BBC correctly points out that “this Court must strive to give force and effect to the legislature’s intent in passing the statute,” *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 336 (1994), that the words of the statute “must be given their plain, usual, and ordinary meaning; and ***the statute must be construed as a whole***,” *McLean v. Maverik Country Stores, Inc.*, 142 Idaho 810, 813 (2006)(emphasis added.)

In this regard, under Idaho’s garnishment statute, WSEC is liable to MRS for the amount owed “unless such property be delivered up or transferred, or such debts be paid to the sheriff . . . until the attachment be discharged or any judgment recovered by him be satisfied.” Idaho Code § 8-508. Furthermore, a “continuing garnishment shall continue in force and effect until the judgment is satisfied.” Idaho Code § 8-509(b).

Here, BBC incorrectly argues that under § 8-508 and 509 MRS’ only claim is against WSEC as garnishee. However, these statutes do not state or imply that MRS has an exclusive remedy only against WSEC as a garnishee. This is simply an argument BBC makes without any statutory language even implying such. BBC’s reading that the remedy allowed under the garnishment statute is MRS’ sole remedy requires statutory construction that needlessly expands the clear language of the statute. The clear intent of the garnishment statutes is to allow recovery from WSEC for its failure to comply with the writ, not to make a garnishee liable for the actions of an intervening tortfeasor like BBC.

must claim MRS did not have a lien or there are “alternative grounds” on which MRS should lose the case.

BBC's argument does not comport with common sense. For example, say Walmart knows that its parking lot is dark, unmonitored, and a place where its customers are routinely robbed. Under BBC's argument, a robber would have no liability to a Walmart customer he robbed in the parking lot because the customer's remedy would be to sue Walmart. Similarly, the fact that WSEC may be liable does not absolve BBC of liability just as the fact that Walmart may be liable does not absolve the robber of liability.

IV. MRS COULD NOT LAWFULLY CONTINUE TO GARNISH CHRIST AFTER THE JUDGMENT AMOUNT HAD BEEN GARNISHED FROM CHRIST.

BBC's second "alternative ground" is to argue that MRS should have simply continued its garnishment of Christ's wages until it had received the full amount of its judgment thereby recovering the amount BBC converted. In other words, BBC argues that MRS had to over garnish Christ or MRS has no claim against BBC. This argument also has no bearing on whether MRS had a valid property interest and whether BBC converted that property interest.

Under applicable Idaho law, "[t]he creditor shall be solely responsible for insuring that the amounts garnished do not exceed the amount due on the judgment." Idaho Code § 8-509(b). The statute places the burden on the creditor to cease the garnishment when the amount of the judgment has been garnished.

Here, MRS garnished \$1,822.41 from Christ's wages on a judgment of \$1,868.15. Rather than run afoul of the law and incur potential liability for garnishing an amount that would "exceed the amount due on the judgment," MRS recalled the garnishment. For some reason that BBC fails to explain, BBC thinks that MRS should have allowed the garnishment to continue until MRS got paid its judgment amount even though continuing the garnishment would have exceeded the amount due on the judgment. BBC's reading of the statute would have denied

Christ due process for contesting BBC's claims. Moreover, BBC's reading of the statute would have cause MRS to violate Idaho law.

V. MRS HAS A PROPERTY INTEREST IN THE FUNDS GARNISHED FROM CHRIST.

BBC's third "alternative ground" is to argue that MRS has no property rights in the actual checks WSEC wrote to BBC even if MRS had a lien/property right in the actual garnished wages. In this regard, MRS has already established that it has an interest in Christ's wages from the time that they were in the hands of the WSEC. Even the magistrate court ruled that MRS had a lien in the funds in WSEC's possession. BBC argues that Christ's garnished wages are different and separate from the WSEC checks WSEC sent to BBC. According to BBC, although MRS may have had a property right in Christ's wages, MRS had no property right in the WSEC checks.

This is like claiming that Jack stole Mike's car but did not convert Jill's cell phone that Jill left in Mike's car—after all, Jack stole Mike's car, not Jill's cell phone. However, once Jack knows Jill's cell phone was in the car, does not return it, and exercises dominion and control over it, then Jack converted Jill's cell phone too. The car was simply a vehicle for transporting Jill's cell phone. Similarly, WSEC's check was simply a vehicle for transporting Christ's funds against which MRS had a lien.

BBC claims that only WSEC has a right to demand return of the checks, but this is incorrect. In *Gissel v. State*, 111 Idaho 725 (1986), the state seized and sold wild rice that the plaintiffs harvested on state and federal lands. *Id.* at 726. The plaintiffs sought to recover the portion of funds pertaining to the rice harvested on the federal lands. *Id.* The state argued that the plaintiffs, as trespassers on the federal land, could not have acquired title to any portion of the rice. *Id.* at 727. In essence, the state was claiming that only the federal government could

claim right to the funds pertaining to the rice harvested on the federal lands. The Idaho Supreme Court disagreed stating that “[o]ne who is otherwise liable to another for harm to or interference with land or chattel is not relieved of the liability because a third person has a legally protected interest in the land or chattel superior to that of the other.” *Gissel v. State*, 111 Idaho 725 (1986). In other words, as prior possessors of the rice, the plaintiffs had a better right to possession of the proceeds than the state; therefore, the state was not relieved of its liability for **conversion** just because the forest service had a superior right to the plaintiffs.

Here, just like the state in *Gissel* could not defend against a claim for conversion arguing that the federal government had a right to the funds the plaintiffs sought, BBC cannot defend against MRS’ claim for conversion arguing that WSEC has a right to the funds MRS seeks. BBC is liable for conversion because it does not have an interest superior to MRS’ interest in the funds, regardless of whatever claim WSEC may have to the funds.

Couched in other terms, the state in *Gissel* claimed that only the true owner, the forest service, should be able to claim the funds. Identically, BBC claims that even if MRS has an interest, only WSEC should be able to claim the funds as the true owner of the funds. However, BBC’s only interest is mere possession that BBC obtained subject to MRS’ prior lien. And BBC fails to offer any explanation how its mere possessory interest is superior to MRS’ prior lien. Therefore, BBC’s interest if any, is subject to both MRS and WSEC’ interests, and the priority between MRS and WSEC is irrelevant in this matter.

BBC cites *Eagleson v. Rubin*, 16 Idaho 92 (1909) for the proposition that the garnishment failed when WSEC mistakenly sent it to BBC. This is an inaccurate reading, and *Eagleson* supports MRS’ position. *Eagleson* stands for the propositions that (1) personal property must

be garnished by manual delivery or taking into custody, and (2) attachment occurs “in the garnishee’s hands.” *Id.* at 100. BBC appears to claim that because Christ’s wages left WSEC’s possession, the garnishment somehow failed. Under *Eagleson*, Christ’s wages were garnished once WSEC had possession of them.

Moreover, *Eagleson* does not say nor does BBC offer any case that says a garnishment fails due to a mistake of the garnishee after the garnishee takes possession. If BBC is claiming that the garnishment failed because MRS did not take manual delivery or take custody, BBC is also mistaken. The manual delivery or custody required in *Eagleson* occurred when WSEC withheld the money from Christ’s paycheck and took possession. MRS’ interest attached at that time before BBC ever came into possession.

BBC distinguishes *Potlatch Lumber Co. v. Runkel*, 16 Idaho 192, 101 P. 396, 398 (1909) based on *Potlatch* involving attachment of real property rather than personal property. MRS cites to this case merely to establish that garnishments create liens. Other Idaho cases support this proposition as well and apply to facts where the lien is against personal property. For example, a garnishment creates a lien on funds deposited in a bank account. *Holloway v. First Nat. Bank*, 45 Idaho 746, 747 (1928). *See also Sullivan v. Mabey*, 45 Idaho 595, 597 (1928) (In discussing attachment of money by way of garnishment, the Idaho Supreme Court stated that “while the possession is not necessarily disturbed, a lien is obtained on defendant's title to the property in the hands of the garnishee”); and *Federal Reserve Bank of San Francisco v. Smith*, 42 Idaho 224 (1926) (“The plaintiff in the attachment action obtained a lien upon the pledged property in the hands of the pledgee bank by virtue of the garnishment proceedings.”)

BBC tries to distinguish *Federal Reserve Bank of San Francisco v. Smith, Id.* and *In re Aughenbaugh*, 2002 WL 33939738, 4 (Bkrtcy.D.Idaho 2002) on the ground that they say nothing about attachment in the hands of a third party not subject to the garnishment. MRS is not claiming that a lien attached while in the hands of BBC (the third party not subject to the garnishment), but that the lien attached in the hands of the garnishee (WSEC). MRS' lien attached before BBC obtained possession. If MRS had not sought the garnishment and obtained its lien, BBC would not have even gained possession because BBC never would have taken the funds from Christ's earnings and mistakenly sent them to BBC.

BBC claims that a lien is neither absolute nor an irrevocable transfer of debtor's rights. Assuming this is true, MRS still has a better right than BBC to the funds because BBC has ***no claim*** other than mere possession. The cases BBC attempts to distinguish allow for lien attachment in the hands of the garnishee and make no provision for lien cancellation. Nor does BBC describe or cite authority for how MRS' lien was extinguished after creation.

BBC argues that it had no actual or constructive notice of any lien on the funds when it received the checks. This is irrelevant because actual notice of a priority interest existed when MRS notified BBC of MRS' right in the funds. As discussed previously, MRS does not doubt BBC's good faith prior to receiving MRS' demand letter, but after MRS made demand for the funds BBC could no longer be acting in good faith because BBC refused to return the funds to MRS knowing that MRS had a better right to the funds than BBC.

MRS agrees that no case discusses what happens when a third party interferes with a properly attached garnishment through conversion. MRS submits that no case has addressed

this situation because no party has ever been so brazen as to interfere in a garnishment in the way that BBC has interfered.

VI. BBC HAS BEEN UNJUSTLY ENRICHED BY MRS.

BBC makes no effort to discuss the case of *Chinchurreta v. Evergreen Management, Inc.*, 117 Idaho 591 (Ct.App. 1989) that MRS cited in its opening brief regarding unjust enrichment. Instead, BBC just challenges the source conferring the benefit on BBC claiming that WSEC, rather than MRS, conferred the benefit. However, MRS did the work to acquire and execute on a judgment. Because of MRS' work acquiring and executing on the judgment, BBC received Christ's money without having to do any of the work necessary for a judgment and execution. All WSEC did was mistakenly sent the funds resulting from MRS' labors to BBC. BBC fails to explain how the benefit would have been conferred without MRS' effort.

BBC cites *Iron Eagle Development, LLC v. Quality Design Systems, Inc.*, 138 Idaho 487 (2003) for the proposition that unjust enrichment and constructive trust are not available as equitable claims when an adequate legal remedy is available. Thus, according to BBC, MRS cannot make equitable claims for unjust enrichment and constructive trust against BBC because MRS has a legal remedy against WSEC.

However, the rule BBC relies on applies only where the same plaintiff makes a claim in equity and also makes a legal claim against the same defendant. *Id.* at 492. Neither *Iron Eagle* nor any other case prevents an equitable claim where a plaintiff has a legal claim against another distinct defendant. For example, in *Iron Eagle* an equitable remedy was not available for the litigants because of "[an] adequate legal remedy under . . . express agreement" between

the parties. *Id.* In other words, a contract between the parties precluded equitable claims ***between the same parties*** for relief.

In *In re Boyd*, 134 Idaho 669 (Ct.App. 2000), a defendant sought to preclude an equitable claim on the grounds that an express contract existed between the plaintiff and another party for the same contractual purpose, and therefore plaintiff had an adequate legal remedy. *In re Boyd* at 673. The Idaho Court of Appeals was not persuaded stating “the express contract and the implied-in-law contract involved different parties. Where an express contract exists, an implied contract between the same parties for the same contractual purpose is precluded from enforcement. Such is not the case here.” *Id.* Accordingly, even assuming MRS had a legal claim against WSEC, such a claim would not preclude equitable relief against BBC, a separate and distinct party.

VII. THE MAGISTRATE COURT ABUSED ITS DISCRETION IN DENYING MRS’ MOTION TO AMEND THE COMPLAINT.

BBC claims that the magistrate court did not abuse its discretion in denying MRS’ motion to amend the complaint arguing that MRS had considerable time for discovery. Discovery time is irrelevant in this case because MRS did not seek to amend its complaint based on discovery issues. MRS sought to amend its complaint because the magistrate court finally recognized that MRS had a lien on the Christ funds but ruled that a lien could not be converted. MRS researched the legal issue and determined that a party could interfere/convert a lien interest under little known aspects of Idaho’s claim and delivery law dating back to the late 1800s.

The magistrate court further abused its discretion in holding that MRS’ intent was to “circumvent the effects of the unfavorable summary judgment.” *Order on Motion for Reconsideration and Motion to File an Amended Complaint*, p.4 dated April 29, 2011. On this

finding, the magistrate court offered no evidence or reasoning because there was no bad faith or dilatory motive. The magistrate court had repeatedly ruled that MRS had no right in the Christ funds, and then in its order in support of summary judgment ruled that MRS had "only" a lien. Again, once the magistrate court recognized MRS had a lien, but had not pleaded a valid cause of action, MRS researched the legal issue and determined that a party could interfere/convert a lien interest under little known aspects of Idaho's claim and delivery law dating back to the late 1800s.

VIII. CONCLUSION.

For all the reasons set forth above, MRS respectfully requests that (1) the Court reverse the judgment of the magistrate court against MRS; (2) direct that the magistrate court grant MRS' motion for summary judgment on conversion; alternatively, the Court should grant MRS' motion for summary judgment on unjust enrichment or constructive trust; if the Court does not grant summary judgment on any of these three theories, then the Court should grant the motion to amend the complaint; (3) order BBC to immediately repay all amounts it garnished MRS after recovering a judgment against MRS for attorney's fees and costs; and (4) award MRS attorney's fees and costs on appeal and ordering the magistrate court to award attorney's fees and costs to MRS for prevailing below.

DATED this 29th day of August, 2011.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 

Bryan D. Smith, Esq.

Attorney for Plaintiff

Medical Recovery Services, LLC

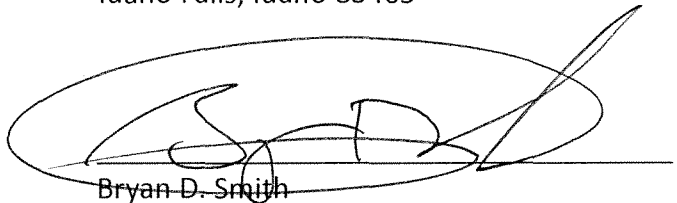
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of August, 2011, I caused a true and correct copy of the forgoing **REPLY BRIEF** to be served, by placing the same in a sealed envelope and depositing it in the U.S. Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

PARTIES SERVED:

- ☒ U.S. Mail
- ☐ Facsimile Transmission
- ☐ Overnight Delivery
- ☐ Hand Delivery
- ☐ Courthouse Mail Box

Todd R. Erikson, Esq.
3456 East 17th Street, Suite 280
Idaho Falls, Idaho 83405



Bryan D. Smith

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

OCT -6 PM 1:47
DISTRICT COURT
7TH JUDICIAL DISTRICT
BONNEVILLE COUNTY ID

MEDICAL RECOVERY SERVICES, LLC,
an Idaho limited liability company,

Case No. CV-2008-5817

Plaintiff/Appellant,

**MEMORANDUM DECISION RE:
APPEAL**

vs.

BONNEVILLE BILLING AND
COLLECTIONS, INC.,

Defendant/Respondant.

I. FACTUAL AND PROCEDURAL BACKGROUND

This matter is an appeal from the Magistrate's Judgment dated November 17, 2010, against Medical Recovery Services, LLC (hereafter, "MRS") entered pursuant to the Magistrate's Order dated August 24, 2010, granting a motion for summary judgment in favor of Bonneville Billing and Collections, Inc. (hereafter, "BBC").

The dispute between MRS and BBC stems from a collection effort that MRS commenced against Stacie Christ in April 2008. On April 23, 2008, MRS filed a complaint against Ms. Christ, and on June 4, 2008, MRS obtained a judgment against her in the amount of \$1,868.15. On June 12, 2008, MRS obtained an Order for Continuing Garnishment against Ms. Christ's employer, Western States Equipment Company (hereafter, "WSEC"). On June 18, 2008, the Bonneville County Sheriff (hereafter, "BCS") served a Writ of Execution and Notice of Continuing Garnishment (hereafter, "Writ") on WSEC. WSEC returned the Acknowledgment of Receipt of Garnishment to BCS on June 23, 2008.

341

On July 10, 2008, WSEC determined \$331.00 of Ms. Christ's wages were subject to the Writ. WSEC cut a check in that amount but accidentally sent the check to BBC. WSEC intended to make the check out BCS pursuant to the Writ, but inadvertently selected BBC instead of BCS on a drop down menu when selecting the payee of the check. On July 24, 2008, WSEC made the same mistake with a check for \$394.84. WSEC made the mistake again on August 7, 2008, with a check for \$357.38.

On August 20, 2008, BCS Deputy Sherrie Bergren informed MRS of the mistake and stated that BBC intended to keep the money. On August 21, 2008, MRS sent a demand letter to BBC asking it to return the \$1,083.21 (hereafter, "the disputed funds"). On August 28, 2008, BBC sent a letter to MRS indicating it had received the three checks but it intended to retain the money.

On September 18, 2008, MRS filed the complaint in this action alleging conversion and unjust enrichment against BBC. On March 19, 2009 MRS filed a motion for summary judgment. The Magistrate Court denied that motion on June 4, 2009, and entered judgment against MRS on June 11, 2009. Both parties believed the Magistrate had entered a final judgment in favor of BBC. The District Court, however, dismissed MRS's subsequent appeal, finding the Magistrate had merely denied MRS's motion for summary judgment.

On April 8, 2010, MRS filed a motion for reconsideration, which the Magistrate denied on July 7, 2010. On August 10, 2010, the Magistrate heard argument regarding BBC's motion for summary judgment that had been filed on July 14, 2009. On August 24, 2010, the Magistrate granted BBC's motion, dismissed MRS's complaint with prejudice, and awarded BBC attorney's fees and costs. On November 17, 2010, the Magistrate Court entered judgment against MRS for attorney's fees and costs in the amount of \$10,658.

On December 1, 2010, MRS filed a second motion for reconsideration, which the Magistrate Court denied on February 16, 2011. On February 23, 2011, MRS filed a third motion to reconsider, which the Magistrate Court denied on April 29, 2011.

MRS filed this appeal on May 3, 2011.

II. STANDARD OF ADJUDICATION

I.R.C.P. 83(u) provides, in part:

The scope of appellate review on an appeal to the district court shall be as follows:

(1) Upon an appeal from the magistrate's division of the district court, not involving a trial *de novo*, the district court shall review the case on the record and determine the appeal as an appellate court in the same manner and upon the same standards of review as an appeal from the district court to the Supreme Court under the statutes and law of this state, and the appellate rules of the Supreme Court.

When a district court sits as an appellate court, the record of the magistrate's proceeding is examined "to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings . . . [F]indings of fact based on substantial and competent, albeit conflicting, evidence will not be set aside on appeal." *Nicholls v. Blaser*, 102 Idaho 559, 561-62, 633 P.2d 1137, 1139-40 (1981) (rehearing denied); *see also Bishcoff v. Cawing-Watkins Properties*, 113 Idaho 826, 748 P.2d 410 (Ct. App. 1987). Issues of law are freely reviewed by appellate courts. *Henderson v. Smith*, 128 Idaho 444, 447, 915 P.2d 6, 9 (1996).

III. ISSUES

MRS raises five issues on appeal:

- (1) Whether the Magistrate Court erred when it ruled that BBC has not been unjustly enriched through the collection efforts of MRS?

- (2) Whether the Magistrate Court erred when it ruled that BBC was not liable for conversion?
- (3) Whether the Magistrate Court erred when it ruled that BBC does not hold the garnished wages in a constructive trust for the benefit of MRS?
- (4) Whether the Magistrate Court erred when it denied MRS's motion to amend its complaint?
- (5) Whether either party is entitled to attorney's fees on appeal?

IV. DISCUSSION

BBC argues the Idaho Garnishment Statutes (Idaho Code §§ 8-508 and 8-509) govern this dispute, and pursuant to those statutes MRS should seek recourse from WSEC. BBC also argues "there is no need for an equitable remedy when a legal remedy is available through the garnishment statutes." Respondent's Brief at 12.

Whether WSEC is liable to MRS under the garnishment statutes says nothing about BBC's liability as an alleged tortfeasor. This Court therefore concludes MRS is not precluded from asserting its conversion claim against BBC. Furthermore, the garnishment statutes do not state or imply that recourse against the garnishee is the exclusive remedy available to a judgment creditor in MRS's position. Thus, MRS's apparent ability to seek recourse against WSEC under the garnishment statute does not preclude MRS from seeking recourse against BBC under other theories of law. The parties agree there is no legal remedy MRS can seek or obtain against BBC under the garnishment statutes. This Court concludes MRS is not precluded from asserting its equitable claims of unjust enrichment and constructive trust.

A. Unjust Enrichment

MRS asserts BBC has been unjustly enriched by the collection efforts of MRS. More specifically, MRS asserts BBC would never have received the funds from WSEC if MRS had not filed suit, obtained a judgment, and garnished Ms. Christ's wages.

BBC raises three issues regarding unjust enrichment: First, BBC asserts the benefit it received was conferred by WSEC and not MRS. Second, BBC asserts it is equitable for BBC to retain the funds because Ms. Christ owed on accounts owned by BBC. Third, BBC asserts MRS's efforts in obtaining the Writ are of minimal value because the process of obtaining such a writ is not difficult.

Unjust enrichment "allows recovery where the defendant has received a benefit from the plaintiff that would be inequitable for the defendant to retain without compensating the plaintiff for the value of the benefit." *Farrell v. Whiteman*, 146 Idaho 604, 200 P.3d 1153, 1161 (2009). To establish a prima facie case for unjust enrichment, the plaintiff must establish three elements: "(1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff of the value thereof." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 88 (1999).

The Magistrate Court held, "In the instant case, Plaintiff conferred no benefit on Defendant because Plaintiff had no benefit to confer." Order on Reconsideration at 4.

The position taken by BBC implicitly and erroneously assumes the funds it received were WSEC funds. Nothing in the record indicates WSEC owed any money to BBC. Once Ms. Christ earned the disputed funds, WSEC became obligated to pay her. WSEC was not free to give Ms. Christ's money to whomever it chose. The record does not show that Ms. Christ ever

instructed WSEC to send her money to BBC. The Writ superseded, in part, WSEC's obligation to pay Ms. Christ for her labor and created the obligation to instead deliver \$1,083.21 of her earnings to MRS. Absent the Writ procured by MRS, therefore, the disputed funds would have been delivered to Ms. Christ and would not have been sent to BBC.

The Magistrate's decision attributes no weight or value to the efforts of MRS in obtaining the Writ. MRS undisputedly incurred out of pocket expenses for filing fees, service fees, sheriff's fees, and legal fees to secure the Writ. Regardless of the amount MRS expended, this Court is convinced BBC would not have received the funds absent MRS's efforts. Moreover, absent instruction or consent from Ms. Christ, or a court order obligating BBC to distribute a portion of Ms. Christ's wages to BBC, BBC had no right to retain the money.¹ This Court therefore concludes it would be inequitable for BBC to retain those funds.

Lastly, this Court believes the degree of effort exerted by MRS in procuring the writ is inconsequential. The elements of unjust enrichment require that some action by the plaintiff—regardless of its significance—caused a benefit to be conferred on the defendant. Then, if the defendant appreciated the benefit under circumstances manifesting inequity, the plaintiff has made a prima facie showing of unjust enrichment. This Court concludes that whether it was “easy” for MRS to file suit, obtain a judgment, and procure the Writ is not relevant to plaintiff's prima facie case for unjust enrichment.

¹ This Court is aware that Ms. Christ may have had a contractual duty to pay BBC. In the section that follows, however, this Court concludes MRS had a lien interest in the disputed funds. There is no evidence that BBC had an earlier lien or superior interest in those funds.

Furthermore, this Court is not persuaded by BBC's argument that MRS could have simply continued the garnishment until it had been paid in full. Regardless of whether MRS could have lawfully done so under the Garnishment Statutes, this Court does not believe MRS should have been burdened to do so. From an equity standpoint alone, MRS had a superior interest in the funds BBC erroneously received, BBC came into possession of the funds as a result of MRS's efforts, and it would be inequitable for BBC to retain the funds.

B. Conversion

MRS asserts service of the Writ on WSEC created a lien on Ms. Christ's garnished wages and that BBC converted that lien.

BBC does not dispute service of the Writ created a lien or that a lien can be converted. BBC argues MRS's conversion claim fails nonetheless because the lien terminated when the garnished wages left WSEC's possession and BCS failed to take or maintain possession of them.

The Magistrate Court held, "This court . . . finds in the instant case that the service of the garnishment documents by the Bonneville County Sheriff to WSEC did not create an ownership of the property in MRS, but a lien only." Order on Reconsideration at 3. In reaching that conclusion, the court relied on the following authority:

A garnishment is "the process by which the garnishee is brought into court, and also that by which the defendant's credit or property is attached in the garnishee's hands. Its service is constructive seizure by notice. It is attachment in the hands of a third person." Inland is correct in its assertion that service of the writ of garnishment created a lien on the property held in the hands of the garnishee—here the Sheriff's Department. "By the service in the manner provided by statute, whether it be termed 'garnishment' or 'service of the attachment,' while the possession is not necessarily disturbed, 'a lien is obtained on defendant's title to the property in the hands of the garnishee.'" "The plaintiff in the attachment action obtained a lien upon the pledged property in the hands of the pledgee bank by virtue of the garnishment proceedings."

In Re David & Laura Aughenbaugh, 2002 WL 33939738 (Bkrcty. D. Idaho) (quoting "*In re Ducommun*, 159 B.R. 919 (Bkrcty. D. Idaho 1993) (citations omitted)).

Despite holding that MRS had a lien on the garnished wages, the Magistrate court stated, "MRS would have to be considered the owner of the property" in order to prevail on its conversion claim. Order on Reconsideration at 3.

Generally, conversion is defined as a distinct act of dominion wrongfully asserted over another's personal property in denial of or inconsistent with rights therein. *See Luzar v. Western Sur. Co.*, 107 Idaho 693, 696, 692 P.2d 337, 340 (1984). A right of action accrues in favor of the owner of property as soon as the property is

wrongfully taken from his possession or wrongfully converted. *See Davidson v. Davidson*, 68 Idaho 58, 63, 188 P.2d 329, 332 (1947).

Peasley Transfer & Storage Co. v. Smith, 132 Idaho 732, 743, 979 P.2d 605, 616 (1999).

The Idaho Supreme Court has also stated, however, that “[a] plaintiff in a conversion action must establish that he had title to the property *or* had the right to possess the property at the time of the conversion.” *Western Idaho Production Credit Ass’n v. Simplot Feed Lots, Inc.*, 106 Idaho 260, 678 P.2d 52 (1984) (emphasis added).

Under the common law, a chattel mortgagee had both title to and possession of the mortgaged goods. If the property had been taken from his possession, it is apparent that he could have maintained an action in conversion. In many jurisdictions, including this state, it is now held that the chattel mortgagee has not title but only a lien on the security, possession being in some one else. But if the mortgage provides that the mortgagee can take possession of the mortgaged goods for breach of the conditions of the mortgage, it is quite generally held that he may maintain conversion against third parties into whose hands the goods may have fallen. The courts hold that breach of the conditions of the mortgage, coupled with the right to possession, give him such a qualified ownership as will enable him to maintain an action of this kind. *Backhaus v. Buells*, 43 Or. 558, 72 P. 976, 73 P. 342; *First National Bank v. St. Anthony & Dakota Elevator Co.*, 103 Minn. 82, 114 N. W. 265; *Cone v. Iverson*, 4 Wyo. 203, 33 P. 31, 37, 35 P. 933.

Forbush v. San Diego Fruit & Produce Co., 46 Idaho 231, 243, 266 P. 659, 663 (1928). *See also Carpenter v. Turrell*, 148 Idaho 645, 227 P.3d 575 (2010).

This Court concludes the Magistrate erred when it concluded MRS must prove ownership in order to maintain an action for conversion. This Court holds that MRS can maintain its conversion claim if it had a lien interest coupled with the right to possess.

Idaho Code § 8-506 provides requirements that must be satisfied to “attach” various types of property:

Debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits or other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the

defendant, or the credits or other personal property in his possession or under his control, belonging to the defendants, are attached in pursuance of such writ.

Id. at § 8-506(5).

Idaho Code § 8-509(b) outlines the garnishment process when the garnishee is the employer of the judgment debtor. In such a situation, “the judgment creditor . . . shall have issued by the clerk of court, a continuing garnishment directing the employer-garnishee to pay to the sheriff such future moneys coming due to the judgment debtor as may come due . . . as a result of the judgment debtor’s employment.” *Id.*

This Court holds that service of the Writ on WSEC created a lien in favor of MRS on employment debts incurred by WSEC as a result of Ms. Christ’s labor. Additionally, the Notice of Continuing Garnishment instructed WSEC to “withhold the maximum amount of [Ms. Christ’s] disposable earnings at each disbursement interval” for the benefit of MRS. Thus, at each “disbursement interval,” MRS had both a lien interest in and a right to possess Ms. Christ’s garnished wages. Accordingly, this court holds that MRS had an interest in those funds sufficient to maintain an action for conversion. BBC unquestionably exercised dominion over the disputed funds, so the remaining question is whether MRS’s lien interest terminated when WSEC accidentally sent the disputed funds to BBC. The answer to that question will determine whether BBC “wrongfully” retained the funds.

BBC cites *In re Ducommun* in support of the argument that MRS lost its lien.² *In re Ducommun*, discusses creation of a garnishment lien and then states the following:

² Preliminarily, this Court questions the wisdom in permitting a garnishee to terminate a garnishment lien by deliberately or accidentally giving garnished funds to someone other than the levying officer or judgment creditor. In general, a lien is a “legal right or interest that a creditor has in another’s property, lasting usually until a debt or duty that it secures is satisfied.” BLACK’S LAW DICTIONARY (9th ed. 2009). Regarding property subject to a garnishment lien, a

[A]ll of the Idaho authorities for the proposition that garnishment creates a lien limit that lien to property actually held by the garnishee. *E.g., Sullivan, supra*, 264 P. at 236 (“[A] lien is obtained on defendant’s title to the property *in the hands of the garnishee* ”) (emphasis added). Possession by the garnishee is, therefore, a necessary element for existence of the garnishment lien.

This accords with other Idaho law. Garnishment is, as *Eagleson* noted, “attachment in the hands of a third person.” 100 P. at 767. In the case of *American Fruit Growers, Inc. v. Walmstad*, 44 Idaho 786, 260 P. 168 (1927), a sheriff served a writ of attachment against [potato sacks] and issued a proper return, but apparently failed to take possession of the property as the return indicated. Because the attachment statute required the sheriff to take personal possession of the property, the Supreme Court of Idaho held that the attachment failed. The Court then considered the effect if the return was correct and the sheriff had taken possession of the property, but had failed to keep possession until the date the property was sold.

However, if we should admit the truth of the statements in the return that the levy was made in substantial compliance with the law, the lien thereof was absolutely lost when the sheriff or his keeper permitted appellant to take and retain possession of the property. Even the return of the sheriff does not purport to indicate that he continued in possession, and the evidence is entirely uncontradicted that at least from September 1st to the date of sale this property was out of the control of the officer, and was in no sense in custodia legis. *The lien of the attaching creditor, if any he ever had, was dependent upon the continuation of possession by the sheriff.*

260 P. at 171 (emphasis added).

The lien that Inland had by virtue of the garnishment was over a portion of those wages that Mr. Ducommun earned in May, 1993. Those funds are no longer in the possession of the . . . garnishee. There is, therefore, no lien against those funds. Moreover, because any funds the [garnishee] presently owes to Mr. Ducommun are (presumably) for work performed other than in May of 1993, there are no funds in the hands of [the garnishee] against which Inland has a lien.

In re Ducommun, 159 B.R. at 920-21.

garnishee’s disbursement of garnished funds to a third party in no way satisfies the debt owed to the lienholder.

This Court disagrees with the bankruptcy court's use of *American Fruit Growers* to support termination of a lien on garnished wages. The Idaho Supreme Court stated the following regarding the holding in *American Fruit Growers*:

Falk-Bloch Mercantile Co. v. Branstetter, 4 Idaho 661, 43 P. 571; *American Fruit Growers, Inc., v. Walmstad*, 44 Idaho 786, 260 P. 168; and similar cases from other jurisdictions . . . hold in effect that in attaching *personal property capable of manual delivery*, the officer must actually seize and hold the property to the exclusion of others, in order to create and maintain the lien of attachment.

Jaquith v. Stanger, 79 Idaho 49, 54, 310 P.2d 805, 808 (1957) (emphasis added). *American Fruit Growers* dealt exclusively with garnishment of personal property capable of manual delivery—potato sacks in that case. Idaho Code § 8-506(3) states, “Personal property capable of manual delivery must be attached by taking it into custody.” An identical statute was in effect when the Idaho Supreme Court rendered the *American Fruit Growers* decision.

In this case, MRS levied on the future earnings of Ms. Christ. When BCS served the Writ, those future earnings were not capable of manual delivery and could not be attached by taking them into custody. Thus, attachment occurred pursuant to Idaho Code § 8-506(5). BCS left the Writ with WSEC and gave notice that wages payable to Ms. Christ were attached pursuant to the Writ. In other words, when a “continuing garnishment” is in effect, attachment is a “continuing” process. As Ms. Christ earned wages, WSEC became obligated to pay her, and MRS obtained a lien on that debt.

This Court agrees that attachment of “tangible property, susceptible of manual seizure and delivery” depends on taking and maintaining possession of the property. In this case, however, the lien attached to a debt not capable of manual delivery. Thus, the levying officer, BCS, did not need to “take” possession of anything in order to create the lien. *See* I.C. § 8-

506(5). It would make no sense to hold that BCS needed to “maintain” possession of anything in order to preserve the lien.

This Court concludes MRS’s lien did not terminate when WSEC erroneously sent the checks to BBC. Thus, BBC, upon learning of MRS’s interest in the disputed funds, had no right to retain them. Whereas the facts are not in dispute, and the Magistrate’s decision regarding ownership should be reversed, this Court concludes summary judgment should be entered in favor of MRS on the issue of conversion.

C. Constructive Trust

MRS asks this court to conclude that MRS holds equitable title to the disputed funds that are in BBC’s possession.

BBC responds stating, “Since MRS did not confer any benefit upon BBC, there can be no unjust enrichment, and thus there can be no constructive trust.”

A constructive trust is an obligation “created by law when money or property has been placed in one person’s possession, under such circumstance that in equity and good conscience, he ought not to retain it.” *Warm Springs Properties, Inc. v. Andora Villa, Inc.*, 96 Idaho 270, 526 P.2d 1106 (1974). “Where a person receives a benefit from another he is liable to pay therefor if the circumstances of its receipt or retention are such that as between the two it is unjust for him to retain it.” *Id.* “A constructive trust is a remedial device created primarily to prevent unjust enrichment; equity compels the restoration to another of property to which the holder thereof is not justly entitled A constructive trust may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled.” *Chinchurreta v. Evergreen Management, Inc.*, 117 Idaho 591, 790 P.2d 372 (Ct. App. 1989).

Pursuant to this Court's prior holding regarding unjust enrichment and conversion, this Court also concludes a constructive trust should be imposed on the disputed funds in favor of MRS.

D. Motion to Amend Complaint

Having concluded that MRS should prevail on the issues of unjust enrichment, conversion, and constructive trust, this Court will not address whether the Magistrate Court abused its discretion in denying MRS's motion to amend its complaint.

E. Pre-Appeal Attorney's Fees

Having concluded MRS should prevail on the issues of unjust enrichment, conversion, and constructive trust, BBC is not the prevailing party, and the Magistrate's order regarding attorney's fees against MRS should be vacated. BBC should be ordered to return the money it received pursuant to that order. As MRS is now the prevailing party, this case should be remanded to the Magistrate for determination of a reasonable award for MRS's pre-appeal attorney's fees.

F. Attorney's Fees on Appeal

This Court concludes MRS is the prevailing party on appeal. Pursuant to Idaho Code § 12-120(1) and Rule 40 of the Idaho Appellate Rules, MRS is entitled to a reasonable award for attorney's fees on appeal.

V. CONCLUSION

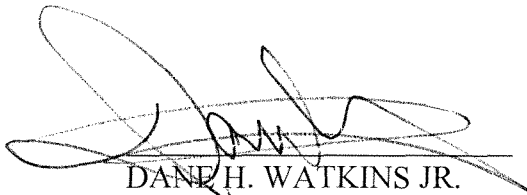
This Court reverses the Magistrate's judgment in favor of BBC. The Magistrate's conclusion regarding unjust enrichment is vacated and summary judgment is hereby entered in favor of MRS on that issue. Consistent with that conclusion, this Court also imposes a constructive trust in favor of MRS on the disputed funds currently held by BBC. As an

alternative basis for this Court's conclusion, this Court holds that a MRS is entitled to summary judgment on its claim for conversion. The Magistrate's conclusion regarding conversion is vacated and summary judgment is hereby entered in favor of MRS on that issue.

This Court has not addressed and will disturb the Magistrate's conclusion regarding MRS's motion to amend.

The Magistrate's order regarding attorney's fees against MRS is vacated, and BBC is hereby ordered to return the money it received pursuant to that order. This Court remands the case for determination of a reasonable, pre-appeal fee award in favor of MRS. Finally, this Court holds MRS is entitled to a reasonable award for attorney's fees on appeal.

DATED this 6 day of October 2011.



DANE H. WATKINS JR.
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of October 2011, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Bryan D. Smith
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405

Todd R. Erikson
TODD R. ERIKSON, P.A.
3456 E. 17th St., Ste. 280
Idaho Falls, ID 83406

RONALD LONGMORE
Clerk of the District Court
Bonneville County, Idaho

By 
Deputy Clerk

255

Todd R. Erikson, #4374
Todd R. Erikson, P.A.
3456 E. 17th St., Ste. 280
Idaho Falls, ID 83406
Telephone: (208) 522-3305

BONNEVILLE COUNTY, IDAHO
2011 OCT 20 PM 4:03

Attorney for Defendant/Respondent

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

| | | |
|----------------------------|---|-----------------------------------|
| MEDICAL RECOVERY SERVICES, |) | Case No. CV 08-5817 |
| PLLC, |) | |
| |) | |
| Plaintiff/Appellant, |) | MOTION FOR RECONSIDERATION |
| vs. |) | |
| |) | BRIEF IN SUPPORT OF MOTION |
| BONNEVILLE BILLING AND |) | |
| COLLECTIONS, INC., |) | |
| |) | |
| Defendant/Respondent. |) | |
| _____ |) | |

Defendant/Respondent, Bonneville Billing and Collections, Inc., (BBC) moves the court pursuant to Idaho Rules of Civil Procedure 11(a)(2)(B) for an order reconsidering and reversing the Memorandum Decision Re: Appeal, dated October 6, 2011, which order reversed the Magistrate's judgment in favor of BBC and an award of attorney fees, ordering BBC to return the attorney fees obtained from MRS, and entered judgment against BBC for unjust enrichment, imposed a constructive trust, and for conversion, and awarded attorney fees against BBC.

In support of its Motion for Reconsideration BBC provides the following brief:

1. Undisputed Facts.

The court seems to have neglected the following undisputed facts in its decision:
On August 20, 2008, Clayne Bodily, BBC's manager, spoke with Western States

Equipment Company (WSEC) which indicated that WSEC had mistakenly sent WSEC checks to BBC, but that WSEC would now send the checks to the Bonneville County Sheriff. Bodily asked if BBC could keep the WSEC checks it had already deposited and applied to Christ's accounts with BBC, and if WSEC could just continue the Medical Recovery Services (MRS) garnishment. WSEC did not reply to BBC regarding this request. Bodily was later informed by WSEC that they had been instructed by MRS's attorney, Bryan D. Smith, not to speak with BBC. WSEC never demanded BBC to return the WSEC checks or disputed funds.

All of the WSEC checks had been deposited by BBC prior to the time that MRS made written demand to BBC for the return of the \$1,083.21 received by BBC from WSEC.

There was a continuing garnishment of Christ's wages from at least July 2008 through at least April 2009 and Christ continued to be employed at WSEC during that entire time. MRS discontinued the garnishment against Christ and, in fact, instructed WSEC to stop payment on a check or to recall a check from the Bonneville County Sheriff from WSEC which had continued to garnish the wages of Christ. WSEC was obligated to continue the garnishment and was continuing the garnishment until ordered to discontinue the garnishment by MRS. If MRS had continued its garnishment rather than discontinuing its garnishment in order to pursue this litigation, then MRS would have received the equivalent amount from WSEC that BBC received from WSEC by October 2008 and this matter would be moot.

2. Real party in interest.

BBC is not the real party in interest. BBC raised this defense in its answer. WSEC is the real party in interest. The checks delivered to BBC by WSEC were written on WSEC's account to BBC. WSEC is the owner of the checks in question. It is irrelevant whether WSEC owed any money to BBC. MRS has no rights in checks written to BBC by WSEC on WSEC's own banking account. BBC negotiated the checks prior to demand by MRS for the return of the disputed funds. WSEC never demanded the return of the disputed funds from BBC.

MRS's action is against WSEC as the garnishee which remains liable to MRS until the garnishment is satisfied pursuant to Idaho statute. BBC has never had in its possession any property of MRS.

3. Garnishment Statutes.

MRS's claims in this matter arise from Idaho's garnishment statutes. MRS's lien on Christ's wages arise from the garnishment statutes. "[T]here is no need for a equitable remedy when a legal remedy is available through the garnishment statutes." *See Iron Eagle Development, L.L.C. v. Quality Design Systems, Inc.*, 138 Idaho 487 (2003). "The remedy by attachment is entirely statutory, and the requirements of the statute must be substantially followed; otherwise, the attaching creditor acquires no superior right or lien upon the debtor's property." *American Fruit Growers, Inc. v. Walmstad*, 44 Idaho 786, 792 (1927). Thus, no superior right or lien can be acquired if the statute is not followed.

It is clear that the Idaho garnishment statutes create the right to garnish and lien wages. Although these statutes create the lien upon Christ's wages, this court did not apply those statutes to the instant case. This court simply disagreed with *In re*

Ducommun, 159 B.R. 919 (Bkrcty. D. Idaho 1993), by quoting from *Jaquith v. Stanger*, 79 Idaho 49 (1957), an action for damages for trespass to the personal property of plaintiff, wherein the court stated, in dicta, that “in attaching personal property capable of manual delivery, the officer must actually seize and hold the property to the exclusion of others, in order to create and maintain the lien of attachment.”

However, personal property is defined as “in a broad and general sense, everything that is the subject of ownership, not coming under denomination of real estate.” Black’s Law Dictionary (9th ed. 2009). Hence, money is personal property. Money is capable of manual delivery, i.e. mailing a check. WSEC was to seize and hold the personal property to the exclusion of others and to forward it (normally by mailing a check) to the sheriff in order to create and maintain the lien of attachment. However, WSEC did not hold the personal property to the exclusion of others. WSEC did not forward a check to the sheriff. A lien was not maintained on checks forwarded to someone other than to the sheriff.

When funds are no longer in the possession of the garnishee there is no lien against those funds. *In re Ducommun*, 159 B.R. at 921. The lien is therefore a possessory lien. “[T]he service of the writ of garnishment create[s] a lien on the property held in the hands of the garnishee.” *In re David & Laura Aughenbaugh*, 2002 WL 33939738 (Bkrcty. D. Idaho). Idaho Code Section 8-506 provides that attachment occurs by a writ for “the credits or other personal property in his possession or under his control.” Idaho Code Section 8-509(b) directs the garnishee to “pay to the sheriff” the wages as they come due.

While MRS continued to have a lien in the future wages of Christ, it had no right

or lien on a check written on a WSEC account to BBC, delivered to BBC, and negotiated by BBC. The lien on Christ's future wages did not terminate because the garnishment was a continuing garnishment.

Furthermore, money is fungible. Money deposited into an account, a general fund, loses its characteristics. There is no evidence that the only money in the WSEC account was wages garnished by WSEC from Christ. Undoubtedly, it was commingled with other funds. Therefore, WSEC checks written to BBC came from a fungible, commingled account.

The court stated that the future earnings of Chris were not capable of manual delivery and could not be taken into custody. However, when those future earnings became present earnings and were, in fact, paid, then they were capable of being delivered to the sheriff. The funds were, therefore, capable of manual delivery to the sheriff. WSEC did not do this. WSEC delivered checks to BBC. Although the garnishment lien is preserved during the continuing garnishment, WSEC still needed to maintain possession of the funds collected in order to preserve the lien as to those funds. Then WSEC had to delivery those funds to the sheriff just as it did when it delivered checks to the sheriff which MRS subsequently refused to accept. If WSEC was no longer in possession of the checks and the sheriff was not in possession of the checks, then there is no possession, and, therefore there is no lien on those checks.

Hypothetically, if WSEC, instead of writing the checks to BBC, had mistakenly written the same checks for the same amounts to Bonneville County Implement which was owed money by WSEC, then would Bonneville County Implement have been liable to MRS for a conversion, been unjustly enriched and a constructive trust have been

constructed? Would Bonneville County Implement be ordered to return the disputed funds to WSEC? The answer would certainly be no. Or, if the money owed to Bonneville County Implement was disputed by WSEC, and WSEC had not intention of paying any amount to Bonneville County Implement would that somehow make any difference? Would Bonneville County Implement then have been liable to MRS for a conversion, been unjustly enriched and a constructive trust have been constructed? It would seem that WSEC would have a claim against Bonneville County Implement over the disputed funds, and MRS would have no interest except as to WSEC. In both examples, as in this case, the simple fact is that WSEC issued checks to a third party, WSEC did not maintain possession of the checks, and WSEC did not deliver the checks to the sheriff. MRS can have no interest in a WSEC check written to any third party, except the sheriff, and delivered to that third party.

The court also stated that MRS would be burdened by continuing the garnishment. How can there be a burden to MRS to continue a continuing garnishment? No further action at all is required by MRS to continue a continuing garnishment. By statute the garnishment continues on its own until the judgment is satisfied.

4. Unjust enrichment.

The court determined that because MRS had garnished Christ's wages that that conferred a benefit upon BBC. However, the only benefit conferred upon BBC was the benefit conferred by WSEC by sending WSEC checks to BBC. The court stated that "BBC would not have received the funds absent MRS's efforts" and that "absent the writ procured by MRS" the funds would have been sent to Christ instead. Nowhere is there a claim by MRS that it directed WSEC to send WSEC checks to BBC.

Using the court's own logic one would have to reach the conclusion that the medical provider who turned over the account to MRS also conferred a benefit upon BBC: for if the medical provider had not turned over the account then MRS would not have garnished Christ, and then WSEC would not have sent WSEC checks to BBC. Using the court's own logic and taking it another step then one would also have to reach the conclusion that Christ himself conferred a benefit upon BBC: for since Christ did not pay the medical account it had to be turned over to MRS, who garnished Christ's account, and then WSEC sent WSEC checks to BBC. It is simply illogical to conclude that MRS conferred any benefit upon BBC. The only benefit conferred upon BBC was by WSEC and no one else.

In the classic, law school, unjust enrichment example A contracts with B to paint B's house, but instead A mistakenly paints C's house. A has conferred a benefit upon C, i.e. A painted C's house. A is the only one who has conferred any benefit upon C.

D, who referred B to A, cannot claim that he has conferred a benefit upon C because without the referral to B then C's house would have never been painted by A. Nor can E, the paint supplier, claim he has conferred a benefit upon C because C's house would not have been painted absent the paint provided by E to A. Nor can F, the mailman, who mistakenly told A that C's house was B's house claim that he conferred a benefit upon C because without that mistake A would not have painted C's house. The only one who conferred a benefit upon C is A: A painted C's house.

In this matter the only one who conferred any benefit upon BBC was WSEC: WSEC wrote checks on WSEC's account to BBC.

Additionally, it is not inequitable for BBC to have accepted the benefit from WSEC as BBC had accounts for which Christ owed, and as WSEC did not make a demand for the return of the disputed funds. It is not inequitable for BBC to retain WSEC checks received from WSEC as MRS would have still received payment from WSEC under the continuing garnishment which would have satisfied the judgment against Christ. However, rather than accepting checks from the sheriff MRS voluntarily discontinued the continuing garnishment which would have satisfied MRS's judgment against Christ and instructed WSEC to stop payment on a check or recalled a check from the Bonneville County Sheriff from WSEC which had continued to garnish the wages of Christ. Furthermore, MRS has an adequate legal remedy against WSEC, the real party in interest, pursuant to Idaho garnishment statutes. As BBC has not been unjustly enriched by MRS, there can be no constructive trust.

5. Conversion.

"A complaint which alleges that plaintiff is the owner and entitled to the possession of property therein described and that defendant converted it to his own use, and which states the value of the property, or alleges that plaintiff has been damaged in a sum named, sufficiently states a cause of action for conversion, unless other averments are required by statute." *Williams v. Bone*,⁷⁴ Idaho 185, 187-88 (1953).

First, as discussed above MRS is not the owner of a WSEC check written to BBC nor entitled to possession of the WSEC check written to BBC. Second, MRS has not been damaged. There was a continuing garnishment of Christ's wages from at least July 2008 through at least April 2009 and Christ continued to be employed at WSEC during that

entire time. MRS discontinued the garnishment against Christ and, in fact, instructed WSEC to stop payment on a check or to recall a check from the Bonneville County Sheriff for which WSEC had continued to garnish the wages of Christ. WSEC was obligated to continue the garnishment and was continuing the garnishment until instructed by MRS to discontinue it. If MRS had continued its continuing garnishment rather than discontinuing it in order to pursue this litigation, then MRS would have received the equivalent amount that BBC received from WSEC by October 2008 and this matter would be moot. MRS would have suffered no damage because it would have received within six weeks the amount MRS sought as damages in its complaint in the amount of the three checks.

“[T]he duty to mitigate, also known as the "doctrine of avoidable consequences," provides that a plaintiff who is injured by actionable conduct of a Defendant is ordinarily denied recovery for damages which could have been avoided by reasonable acts, including reasonable expenditures, after actionable conduct has taken place. *See Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 261 (1993).” *Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732, 743 (1999).

MRS had a duty to mitigate its “damages” by continuing the garnishment against Christ with WSEC. However, MRS chose to “discontinue” the garnishment and told WSEC to stop payment on a check or to recall a check from the Bonneville County Sheriff which would have gone toward the judgment obtained by MRS against Christ. Additionally, MRS directed WSEC not to speak to BBC.

If MRS had continued the continuing garnishment, which would not have involved any additional expenditure, work, or “burden” by MRS, then MRS’s judgment


would have been satisfied. BBC's retention of the checks written to it by WSEC would have only prolonged MRS's garnishment by three pay periods or approximately one and one-half months.

One might wonder why MRS did not mitigate its "damages" by accepting the next three garnishment checks from WSEC rather than stopping the garnishment. MRS had the ability to make itself whole but failed to do so. MRS has failed to mitigate its damages. There simply is no conversion.

6. Conclusion.

Based upon the foregoing this court should reverse its Memorandum Decision Re: Appeal dated October 6, 2011, and affirm the Magistrates' repeated judgment in favor of BBC and its award of attorney fees to BBC. And BBC should be entitled to its fees in this matter on appeal.

DATED this 20th day of October, 2011.


Todd R. Erikson

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 20th day of October, 2011, by first class mail:

Bryan N. Zollinger
Bryan D. Smith
Smith, Driscoll & Associates, PLLC
PO Box 50731
Idaho Falls, ID 83405



Todd R. Erikson, #4374
Todd R. Erikson, P.A.
3456 E. 17th St., Ste. 280
Idaho Falls, ID 83406
Telephone: (208) 522-3305
Fax: (208)523-5840
Email: eriksonlaw@gmail.com

BONNEVILLE COUNTY
IDHO
NOV 17 AM 9:27

Attorney for Defendant/Appellant

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

| | | |
|-----------------------------------|---|-------------------------|
| MEDICAL RECOVERY SERVICES, |) | Case No. CV 08-5817 |
| LLC, a limited liability company, |) | |
| Plaintiff/Respondent, |) | NOTICE OF APPEAL |
| vs. |) | |
| |) | |
| BONNEVILLE BILLING AND |) | |
| COLLECTIONS, INC., a corporation, |) | |
| Defendant/Appellant. |) | |
| _____ |) | |

TO: THE ABOVE-NAMED RESPONDENT, MEDICAL RECOVERY SERVICES, LLC, ITS ATTORNEYS, SMITH, DRISCOLL & ASSOCIATES, PLLC, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, Bonneville Billing and Collections, Inc., appeals against the above-named Respondent, Medical Recovery Services, LLC, to the Idaho Supreme Court from the Memorandum Decision Re: Appeal (1) reversing the Magistrate's judgment in favor of Appellant, (2) vacating the magistrate's conclusion regarding unjust enrichment and entering summary judgment in favor of Respondent, (3) imposing a constructive trust in favor of Respondent on the disputed funds held by Appellant, (4) granting Respondent summary judgment on its claim for conversion, (5) vacating the magistrate's conclusion regarding conversion and entering summary judgment in favor of Respondent, (6) vacating the magistrate's order regarding attorney's fees against Respondent, (7) ordering Respondent to return the money it received pursuant to the

magistrate's order regarding the award of attorney fees to Appellant, (8) remanding the case for a determination of a reasonable, pre-appeal fee award in favor of Respondent, and (9) awarding Respondent a reasonable award of attorney's fees on appeal; entered in the above-entitled action on October 6, 2011, Honorable District Judge Dane H. Watkins Jr..

2. The Appellant has a right to appeal to the Idaho Supreme Court, and the judgment or order described in paragraph 1 above is an appealable order under and pursuant to Rule 11(a)(1) I.A.R.

3. Preliminarily, the issues on appeal are as follows:

A. The decision and order was not consistent with applicable law nor supported by substantial and competent evidence.

B. Attorney fees and costs on this appeal.

C. This list of issues shall not prevent the Appellant from asserting other issues on appeal.

4. An order has not been entered sealing all or any portion of the record.

5. A reporter's transcript is not requested.

6. Appellant requests the preparation of the clerk's record pursuant to Rule 28, and, in addition, the following documents:

A. Brief in Support of Motion for Summary Judgment, March 19, 2009.

B. Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment, March 19, 2009.

C. Defendant's Brief Re: Summary Judgment, April 20, 2009

D. Affidavit of Clayne Bodily, April 21, 2009.

E. Response to First Request for Admission, April 21, 2009.

F. Order Denying Plaintiff's motion for summary judgment, June 4, 2009.

G. Judgment, June 11, 2009.

H. Appellate Brief, August 17, 2009.

I. Defendant/Respondent's Brief, October 7, 2009.

J. Brief in Support of Motion for Reconsideration, April 8, 2010.

K. Defendant/Respondent's Brief, May 12, 2010.

- L. Order on Motion to Reconsider, June 29, 2010.
- M. Order granting Defendant's motion for summary judgment, August 24, 2010.
- N. Order on settlement of attorney fees and costs, November 17, 2010.
- O. Judgment, November 17, 2010.
- P. Brief filed in support of motion for reconsideration, January 13, 2011.
- Q. Order on Reconsideration, February 16, 2011.
- R. Order on Motion for reconsideration, April 29, 2011.
- S. Appellate Brief, July 11, 2011.
- T. Respondent's Brief, August 8, 2011.
- U. Reply Brief, August 29, 2011.

7. I certify:

- A. That the estimated fee for preparation of the clerk's record has been paid.
- B. That the appellate filing fee has been paid.
- C. That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 17th day of November, 2011.




Todd R. Erikson

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 17th day of November, 2011, by first class mail:

Bryan D. Smith
Smith, Driscoll & Associates, PLLC
PO Box 50731
Idaho Falls, ID 83405



Bryan D. Smith, Esq.
Idaho State Bar # 4411
Bryan N. Zollinger, Esq.
Idaho State Bar # 8008
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731

NOV 22 PM 6:03
DISTRICT COURT
7TH JUDICIAL DISTRICT
BONNEVILLE COUNTY ID

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MEDICAL RECOVERY SERVICES, LLC, an
Idaho limited liability company,

Plaintiff,

vs.

BONNEVILLE BILLING AND COLLECTIONS,
INC, a Utah corporation,

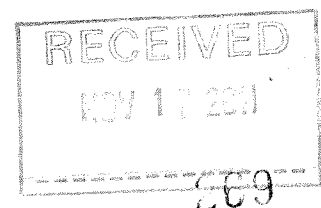
Defendant.

Case No. CV-08-5817

**ORDER DENYING DEFENDANT'S MOTION
FOR RECONSIDERATION**

THIS MATTER having come on regularly for hearing on defendant's Motion for Reconsideration before the Honorable Dane H. Watkins, Jr., District Judge on November 17, 2011, with plaintiff appearing by and through Bryan D. Smith, Esq., of the firm Smith, Driscoll & Associates, PLLC, and defendant appearing by and through Todd R. Erikson, Esq., of the firm Todd R. Erikson, P.A.; and the Court having reviewed its files, considered oral arguments from counsel, and otherwise being fully advised on the premises;

IT IS HEREBY ORDERED That Defendant's Motion for Reconsideration is DENIED.



MADE AND ENTERED this 22 day of November, 2011.

By: 

Hon. Dane H. Watkins, Jr.
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22 day of November, 2011, I caused a true and correct copy of the foregoing **ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

| | |
|--|---|
| Bryan D. Smith, Esq. Smith, Driscoll & Associates, PLLC P. O. Box 50731 Idaho Falls, Idaho 83405-0731 | <input checked="" type="checkbox"/> U. S. Mail <input type="checkbox"/> Fax <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Hand Delivery |
| Todd R. Erikson, Esq. 3456 East 17 th Street, Suite 280 Idaho Falls, Idaho 83405 | <input checked="" type="checkbox"/> U. S. Mail <input type="checkbox"/> Fax <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Hand Delivery |

CLERK OF THE DISTRICT COURT

By: 

Deputy Clerk

1710
Lettie

Bryan D. Smith, Esq.
Idaho State Bar # 4411
Bryan N. Zollinger, Esq.
Idaho State Bar # 8008
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731

2011 NOV 30 PM 4:15

CLERK OF DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY
IDAHO

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MEDICAL RECOVERY SERVICES, LLC, an
Idaho limited liability company,

Plaintiff,

vs.

BONNEVILLE BILLING AND COLLECTIONS,
INC, a Utah corporation,

Defendant.

Case No. CV-08-5817

**REQUEST FOR ADDITIONAL TRANSCRIPT
AND RECORD**

**TO: THE ABOVE NAMED APPELLANT, BONNEVILLE BILLING AND COLLECTIONS, INC., ITS
ATTORNEY, TODD R. ERICKSON, THE COURT REPORTER AND THE CLERK OF THE ABOVE
ENTITLED COURT.**

NOTICE IS HEREBY GIVEN, that the Respondent, Medical Recovery Services, LLC., in the
above-entitled proceeding hereby requests, pursuant to Rule 19, I.A.R., the inclusion of the
following material in the reporter's transcript and the clerk's record in addition to that required
to be included by the I.A.R. and the Notice of Appeal. Any additional transcript is to be provided
in hard copy:

271

1. Reporter's transcript:

A. Transcript of the Appellate Hearing held on November 7, 2011.

2. Clerk's Record:

A. Affidavit of Bryan Zollinger and attached exhibits filed March 19, 2009.

3. I certify that a copy of this request for additional transcript has been served on each court reporter of whom a transcript or record is requested as named below at the addresses set out below and that the estimated number of additional pages being requested is 50.

4. I further certify that this request for additional record has been served upon the clerk of the district court and upon all parties required to be served pursuant to I.A.R. Rule 20.

DATED this 30th day of November, 2011.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 

Bryan D. Smith, Esq.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November, 2008, I caused a true and correct copy of the foregoing **REQUEST FOR ADDITIONAL TRANSCRIPT AND RECORD** to be served, by placing the same in a sealed envelope and depositing it in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Todd R. Erikson, Esq.
3456 East 17th Street, Suite 280
Idaho Falls, ID 83405

☒ U.S. Mail
☐ Facsimile
☐ Overnight Delivery
☐ Hand Delivery

By: 

Bryan D. Smith

Todd R. Erikson, #4374
 Todd R. Erikson, P.A.
 3456 E. 17th St., Ste. 280
 Idaho Falls, ID 83406
 Telephone: (208) 522-3305

JAN 26 PM 3:48
 DISTRICT COURT
 7TH JUDICIAL DISTRICT
 BONNEVILLE COUNTY ID

Attorney for Defendant/Respondent

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**


| | | |
|------------------------------------|---|-------------------------------|
| MEDICAL RECOVERY SERVICES, |) | Case No. CV 08-5817 |
| PLLC, a limited liability company, |) | |
| Plaintiff/Appellant, |) | REQUEST FOR ADDITIONAL RECORD |
| vs. |) | |
| |) | |
| BONNEVILLE BILLING AND |) | |
| COLLECTIONS, INC., a corporation, |) | |
| Defendant/Respondent. |) | |
| _____ |) | |

TO: THE ABOVE NAMED PLAINTIFF, ITS ATTORNEY, AND THE CLERK OF THE
 ABOVE ENTITLED COURT

Notice is given that Defendant requests pursuant to Rule 19, I.A.R., the inclusion of the
 following material in the clerk's record in addition to that required to be included in the I.A.R. and
 the Notice of Appeal.:

1. Motion for Reconsideration and Brief in Support of Motion filed October 20, 2011.
2. Order Denying Defendant's Motion for Reconsideration, dated November 22, 2011.

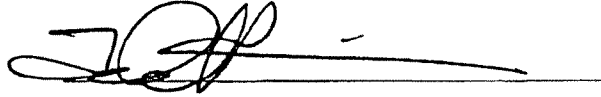
DATED this 26th day of January, 2012.


 Todd R. Erikson

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 26th day of January, 2012, by courthouse box:

Bryan D. Smith
Smith, Driscoll & Associates, PLLC
PO Box 50731
Idaho Falls, ID 83405

A handwritten signature in black ink, appearing to be "B.D. Smith", is written over a horizontal line.

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

MEDICAL RECOVER SERVICES,)
LLC, a limited liability company,)

Plaintiff/Respondent,)

vs.)

BONNEVILLE BILLING AND)
COLLECTIONS, INC., a corporation,)

Defendant/Appellant.)
_____)

Case No. CV-2008-5817

Docket No. 39408-2011

**CLERK'S CERTIFICATION
OF EXHIBITS**

STATE OF IDAHO)
)
County of Bonneville)

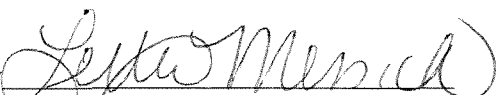
I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the foregoing Exhibits were marked for identification and offered in evidence, admitted, and used and considered by the Court in its determination: please see attached sheets (0 page).

NONE

And I further certify that all of said Exhibits are on file in my office and are part of this record on Appeal in this cause, and are hereby transmitted to the Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court
this 2nd day of February, 2012.

RONALD LONGMORE
Clerk of the District Court

By 
Deputy Clerk

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

MEDICAL RECOVER SERVICES,)
LLC, a limited liability company,)
)
Plaintiff/Respondent,)
)
vs.)
)
BONNEVILLE BILLING AND)
COLLECTIONS, INC., a corporation,)
)
Defendant/Appellant.)
_____)

Case No. CV-2008-5817

Docket No. 39408-2011

CLERK'S CERTIFICATE


STATE OF IDAHO)
)
County of Bonneville)

I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the above and foregoing Record in the above-entitled cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

I do further certify that all exhibits, offered or admitted in the above-entitled cause, will be duly lodged with the Clerk of the Supreme Court along with the Court Reporter's Transcript (if requested) and the Clerk's Record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand affixed the seal of the District Court this 2nd day of February, 2012.

RONALD LONGMORE
Clerk of the District Court

By: 
Deputy Clerk

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

| | | |
|-----------------------------------|---|-------------------------------|
| MEDICAL RECOVER SERVICES, |) | |
| LLC, a limited liability company, |) | |
| |) | |
| Plaintiff/Respondent, |) | Case No. CV-2008-5817 |
| |) | |
| vs. |) | Docket No. 39408-2011 |
| |) | |
| BONNEVILLE BILLING AND |) | CERTIFICATE OF SERVICE |
| COLLECTIONS, INC., a corporation, |) | |
| |) | |
| Defendant/Appellant. |) | |
| _____ |) | |

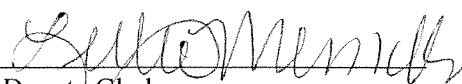
I HEREBY CERTIFY that on the ____ day of February, 2012, I served a copy of the Reporter's Transcript (if requested) and the Clerk's Record in the Appeal to the Supreme Court in the above entitled cause upon the following attorneys:

Bryan D. Smith
SMITH DRISCOLL & ASSOCIATES
PO Box 50731
Idaho Falls, ID 83405

Todd R. Erikson
TODD R. ERIKSON, P.A.
3456 E. 17th St., Ste. 280
Idaho Falls, ID 83406

by depositing a copy of each thereof in the United States mail, postage prepaid, in an envelope addressed to said attorneys at the foregoing address, which is the last address of said attorneys known to me.

RONALD LONGMORE
Clerk of the District Court

By: 
Deputy Clerk